TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted] 214

THE UNITED STATES, APPELLANT,

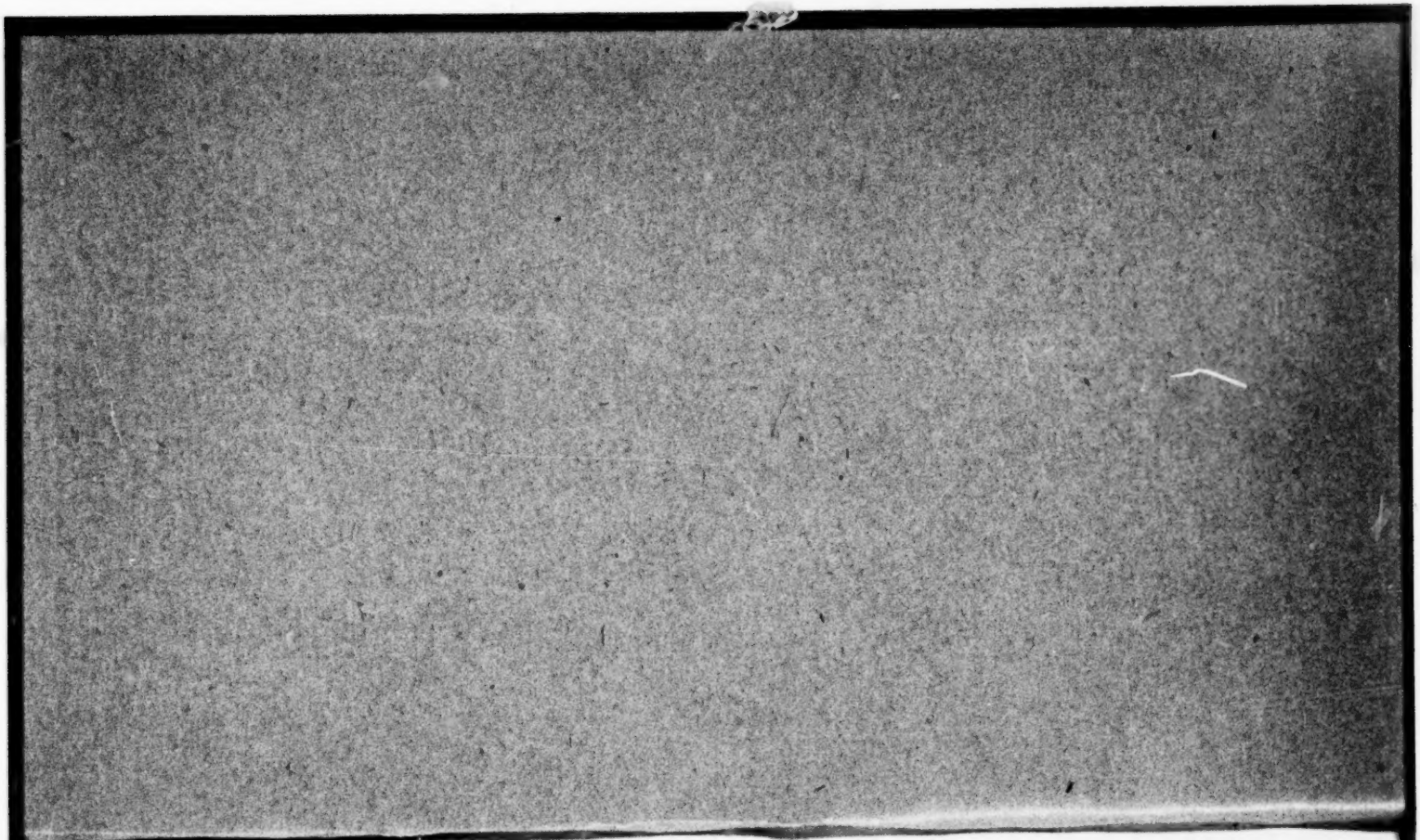
vs.

ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER [redacted], 1919.

(26767)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 681.

THE UNITED STATES, APPELLANT,

vs.

ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT.

APPEAL FROM THE COURT OF CLAIMS.

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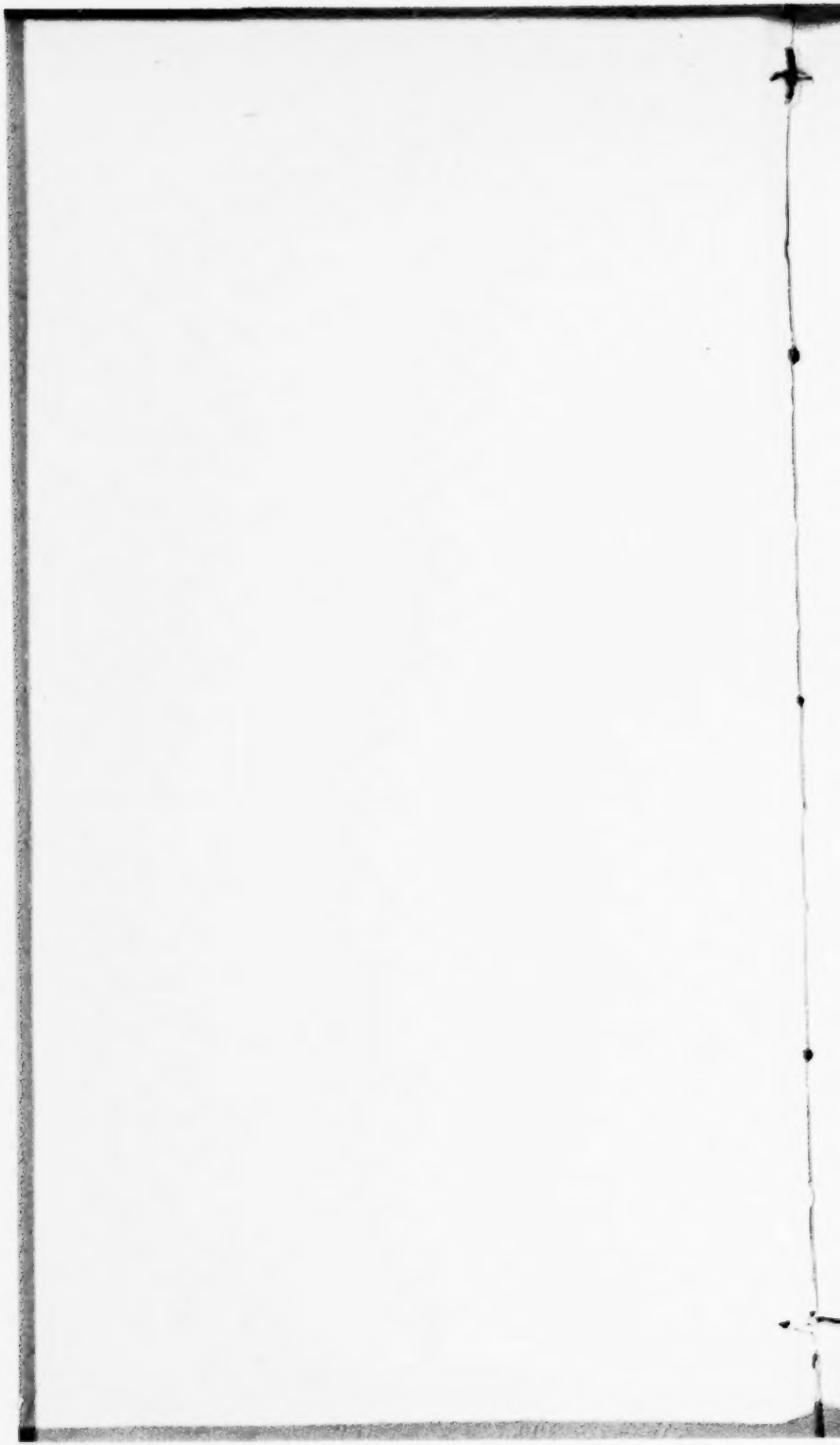

1 I. *Petition and Exhibits "A," "B," and "C." Filed April 27, 1916.*

In the Court of Claims.

No. 33240.

ATLANTIC DREDGING COMPANY,
W. B. BROOKS, Agent.

vs.

UNITED STATES.

(Filed Apr. 27, 1916.)

PETITION.

To the Honorable, the Court of Claims:

The claimant, the Atlantic Dredging Company, respectfully represents:

(1) Claimant is a corporation duly organized and existing under the laws of the State of Pennsylvania, and at the time of the happening of the matters and things hereinafter set forth was engaged in the business of a general contractor.

(2) On the 8th day of October, in the year nineteen hundred and twelve, Lieut. Col. Jos. E. Kuhn, Corps of Engineers, United States Army, by authority of the Secretary of War, caused to be published in the newspapers printed and circulated in the City of Philadelphia and other cities of the United States the following advertisement:

2 "PHILADELPHIA, PA., *Oct. 8, 1912.*

Sealed proposals for dredging in Delaware River below Philadelphia will be received at this office until twelve o'clock noon, November 8, 1912, and then publicly opened. Information on application.

JOSEPH E. KUHN,
Lieut. Col. Engineers."

(3) Claimant being desirous of bidding upon said work, applied at the office of Colonel Kuhn, in Philadelphia, as suggested in the advertisement, for information as to the nature of the dredging to be done and the terms and conditions under which it would have to be undertaken.

(4) Thereupon claimant was furnished by Colonel Kuhn (who, and his successors will hereafter be referred to as the "contracting officer") with the specifications for the dredging in question, which

had been prepared by the Government and were on file in the contracting officer's office in Philadelphia, and was notified that all bids would have to be based upon these specifications. A copy of these specifications is hereto attached, marked "Exhibit A."

(5) Upon examining these specifications, claimant determined to bid for the dredging in the section designated in subdivision (3) of paragraph 16, and therein described as

"Lower end of Mifflin Range, connecting range, and upper end of Tinicum Range."

(6) The quantity of materials to be dredged in said section was stated in said subdivision (3) to be estimated at 1,340,000 cubic yards, scow measurement, which estimate was stated in paragraph 7 of the specifications to be an approximate estimate.

3 (7) In order to enable claimant to form any intelligent judgment as to the price which he could afford to bid for doing said dredging, it was necessary to have some information as to the character of the material to be dredged.

(8) Claimant had no knowledge or information of its own at that time, except the general impression that the material in the channel of the Delaware River in that neighborhood was generally soft mud, and owing to the extent of the area to be dredged and the fact that all bids were required to be submitted within thirty days from the date of the advertisement, it would have been impossible for claimant to have made any such examination of the channel as would have enabled it to ascertain for itself the character of the material to be dredged, as the Government well knew.

(9) For information on this subject claimant was referred by the contracting officer to paragraph 27 of the specifications, wherein was made the following statement:

"27. The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from Station 54 to Station 55+144 at the lower end of West Horseshoe Range, where the material is firm mud, sand and gravel or cobbles." (The section between Station 54 to 55+144 was not included in the area covered by the contract sued upon in this case.) "Bidders are expected to examine the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

"A number of test borings have been made in all of the
4 areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy.

"The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock or outcroppings of sufficient size to be classified.

"Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include detached rocks or boulders capable of being raised in one piece. Should ledge rock be encountered, all over lying loose material shall be removed at the price bid for the general dredging."

(10) Claimant understood from these specifications that the United States (hereinafter referred to as the "Government") did not intend to warrant the material to be dredged to be "mainly mud, or mud with an admixture of fine sand," but claimant did understand that the Government *believed* that such was the character of the material; that it had information in its possession sufficient, in its opinion, to justify such a belief; and that included in that information was the information furnished by the specimens of the material which had been obtained through test borings made by the Government in the usual way for the purpose of ascertaining in the most direct and certain manner the character of said material; and, knowing that the Government had been having dredging done in the channel
5 of the Delaware River at this point for a long time prior to the date of said advertisement, and that it had had ample opportunities for and means of making itself acquainted with the real character of the channel, and that therefore, if the Government believed the material to be removed from the area in question to be mainly mud, or mud with an admixture of fine sand, there was very little likelihood that the material was other than what the Government believed it to be, and little risk involved in assuming that the Government's belief was well founded, made its bid for said work in reliance upon said representations of the Government with regard to the character of the material to be removed.

(11) Claimant's bid was submitted within the time limited by the advertisement—that is to say, within thirty days from the date of said advertisement—in writing, with the guarantee required by the specifications, and said bid was accepted.

(12) Thereafter, to wit, on the 18th day of December, 1912, claimant entered into a contract (as contemplated by said specifications) with the United States, acting by and through said Lieut. Col. Jos. E. Kuhn, the contracting officer, for dredging said channel in the "lower end of Mifflin Range, connecting range, and upper end of Tinicum Range," as provided in said specifications, copy of which contract is annexed to this petition, marked "Exhibit B."

(13) Said contract, in accordance with its terms, was not to be binding until approved by the Chief Engineer of the United States Army, and it was not so approved by said Chief Engineer until the 28th of February, 1913.

6 (14) It was provided in paragraph 28 of the specifications that the contractor should state in his proposal or bid the character and capacity of the plant proposed to be employed by him in doing the work, and that the plant should be subject to the inspection and approval of the contracting officer, and kept in such

condition as, in the judgment of the contracting officer, would make it sufficient to perform the work required by the contract.

(15) Accordingly, when claimant's bid was accepted, it brought its plant to the ground, and the same was seen and inspected by the contracting officer.

(16) The plant at that time consisted of certain dredges.

(17) This plant was suitable for the dredging and placing on shore of ordinary mud, or mud with an admixture of fine sand, material which could be removed with comparatively little difficulty or expense.

(18) It was not at all adapted to or suitable for dredging or putting on shore compacted sand or gravel or other hard and refractory substances.

(19) This plant, however, was accepted and approved by the contracting officer, and work was begun by claimant under said contract.

(20) The work not proceeding as rapidly as the contracting officer thought proper, on or about the ------ day of ------, 1913, claimant, with the knowledge and approval of the Government, entered into a subcontract with Sanford & Brooks Company, Inc. (claimant at the same time designating and appointing Walter B. Brooks, jr., president of the said Sanford & Brooks Company,
7 Inc., its agent to represent it in all dealings with the Government growing out of said contract and to receive all moneys payable by the Government to it thereunder), in and by which contract said Sanford & Brooks Company, Inc., undertook to complete the dredging required by said contract.

Said Sanford & Brooks Company, Inc., and said Walter B. Brooks, jr., its president, were, and each of them was, a contractor of long experience and had done a great deal of dredging for the Government and other parties, and the officials of said company were especially skilled and experienced in said work.

Said company had ample equipment for all kinds of dredging, and claimant avers and charges that through the agency of said Sanford & Brooks Company, Inc., it has already done all, and more than all, than it has been under any obligation to do under said contract.

(21) Through the agency of said Sanford & Brooks Company, Inc., claimant secured the use of additional dredges, named as follows:

"Defender."

"Canton."

"Pump Yankee."

also mud scows, water scows, tugboats, and other paraphernalia.

(22) With this plant and equipment claimant could easily have completed all the dredging contemplated by said contract within seven months if the material to be removed had been "mainly mud, or mud with an admixture of fine said," but said plant was not
8 adapted to the dredging of such hard material as compacted sand and gravel, or other refractory material, except at very heavy cost to the contractor.

(23) Claimant began work under said contract at the point designated by the Government's engineer.

(24) From the very beginning of the work the material encountered by claimant was not mainly mud, or mud with an admixture of fine sand, but mainly material considerably more difficult to remove, such as firm mud, hard sand, some cobbles, etc.

Nevertheless, the material encountered during the first month or two of the work was easy to dredge as compared with that which was encountered a very short time thereafter, when claimant encountered, and has continued to encounter until the cessation of the work, material vastly more difficult and expensive to dredge than mud, or mud with an admixture of fine sand, the same consisting mainly of a very hard, firm mud, together with compacted sand, gravel, cobbles, and clay, a very small percentage being soft mud, and claimant in fact says that the material encountered throughout the area covered by said contract has not been mainly mud, or mud with an admixture of fine sand, but that more than seventy-five per cent of it has been of the kind above indicated, hard or compacted sand, gravel, very firm, and mud and cobbles.

(25) Owing to the fact that by far the greater part of the material to be excavated proved to be not soft mud, but vastly more difficult and refractory material, it became extremely difficult, if not impossible (certainly not possible without providing a different plant),
9 for claimant to comply with that provision of the specifications which required all material dredged to be deposited in enclosed basins above high water, and in recognition of this fact the contracting officer, Lieut. Col. George A. Zinn, on the 4th of May, 1915, entered into a supplemental agreement with claimant, copy of which is hereto attached, marked "Exhibit C," wherein it was recited that—

"It is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

"That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered; that the deposit of said heavy material in enclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in enclosed basins above high water will not be injurious to navigation."

And thereupon it is stipulated in said supplemental agreement that the provisions of said original contract with claimant be modified "in the following particulars, but in no others:

"(1) That all material excavated and removed under the said contract, other than mud, or mud with an admixture of fine sand, may be deposited in Delaware River at points above or below the Chester Island Dike, or behind Tinicum Island, in the order named, and at locations indicated by the contracting officer;

"(2) That in consideration of the change in manner of disposal of said material, the unit price of twelve and ninety-nine one-
10 hundredths cents ($0.1299) per cubic yard, scow measurement, as originally agreed upon, shall be reduced in the sum of two cents ($0.02), &c.

"(3) That nothing in this agreement shall be understood as affecting any of the provisions of paragraph six of said contract of December 18, 1912."

At the time of entering into this supplemental agreement, claimant, while having discovered, as already stated, that the material to be excavated was entirely different from that which had been indicated in the specifications, was not aware and had not discovered, and did not discover until shortly before the cessation of work on this contract, that at the time the Government invited bids for this work upon said specifications containing the statement that it believed the material to be removed was to be mainly mud, or mud with an admixture of fine sand, and that test borings had been made over the area to be excavated, the Government had not had any information as to the character of the said material which it deemed sufficient to entitle it to form and express such an opinion, and particularly did not know that the Government's opinion was not based, as was indicated in the specifications, in any degree upon test borings made in the area to be dredged, and that in fact no test borings had been made.

(26) As soon as claimant discovered the truth in this regard, he promptly made complaint to the contracting officer, and subsequently to the Secretary of War, and asked for redress.

(27) Claimant further, in fact, says that the maps and drawings in the contracting officer's office in Philadelphia, to which it
11 was referred in the specifications, purported to show the result of test borings made in the area covered by the contract, but claimant has ascertained, and now respectfully shows, that as a matter of fact no borings whatever had ever been made by the Government in said area at the time of the advertising for bids and the showing of said specifications to bidders, including claimant.

(28) Claimant further shows that as the result of work actually done, it is able to state, and does state, that if borings had been made, or even careful soundings, at the points in the channel at which said maps purport to show that borings were made, the Government must have known that the character of the bottom was not such as was shown by said supposed borings upon said maps, but that it was mainly compacted sand and gravel and other material of difficult and refractory character.

(29) Claimant is further informed, believes, and charges that the Government through its agents did make certain soundings in said channel, and that the persons making said soundings well knew that the material to be removed, as is disclosed by said soundings, was not "mainly mud, or mud with an admixture of fine sand," but

that it was mainly of very much harder, refractory, and more difficult material.

(30) And claimant further, in fact, says that the said statement on the part of the Government in said specifications, that it believed the material to be removed to be "mainly mud, or mud with an admixture of fine sand," was not true, in that it had no evidence before it which it considered adequate to furnish the basis of a belief as distinguished from a mere guess, and in that said belief was
12 not based in any degree upon test borings, no such borings having been made.

(31) And claimant further says that by reason of said misrepresentations contained in said specifications and upon said drawings, it was misled into making a bid for the doing of said work which was very much lower than it would ever have made but for said misrepresentations and making a contract for a price totally inadequate for the same.

(32) Claimant was also misled into providing itself with a plant and equipment for doing said dredging not suitable for dredging material of the character encountered, so that the time consumed by it in the doing of said work was necessarily much greater than it should have been, and the expense of doing said work vastly increased, so that claimant was compelled to expend a very large sum over and above the rates named in its bid and in said contract, which rates were based, as already stated, upon the material designated in the specifications and upon said maps.

(33) If the material to be dredged had been of the character indicated by the specifications, claimant could have completed the dredging on the estimated 1,340,000 cubic yards at an expense of $107,200. By reason of the fact that the material actually encountered was not the kind indicated in the specifications, but of a kind vastly more difficult and expensive, as above set forth, the actual expense of dredging the same up to the time of the completion and cessation of the work under contract was $688,080.82

Or an excess of 580,880.82

13 After crediting the amount actually received from the government under the contract, viz 142,959.10

there is a balance left of 437,921.72

for which claimant demands judgment in any event.

(34) But claimant further submits that by means of the misrepresentations contained in the specifications and maps regarding the character of the material to be dredged, it was caused to undertake and to do a kind of work which it would never have willingly undertaken, and did not, in a legal sense, contract to do at all, and is entitled to be paid the fair value of such work, which would be $688,080.82

less cash received from the Government on account of the work 142,959.10

leaving a balance of 545,121.72

for which amount claimant demands judgment.

Claimant, therefore, claims as follows:

"A."

Extra cost of dredging operations on Delaware River contract with United States Government, dated December 18, 1912—		
For towing		$69,720.06
For coal		41,736.73
For pay rolls		109,722.84
For general operating expenses, including repairs to plant, supplies, traveling expenses, insurance, etc		120,329.56
For supervision 2½ years		12,500.00
		$354,009.19
14 For use of plant—		
Finn McCool, 4 months, 5 days	$6,250.00	
Dredge Colonel, 35 months 4 days	33,133.32	
Dredge Edw. M. Harris, 33 months 4 days	33,133.32	
Dredge Defender, 28 months 3 days	56,200.00	
Dredge Canton, 12 months 27 days	19,350.00	
Tug Frances, 12 months 27 days	6,450.60	
Tug Alice, 28 months 14 days	14,233.32	
Scows from beginning of contract to Jan. 1, 1916	75,572.00	
		$244,321.96
		$598,331.15
Add for overhead charge, office expenses and profit, 15 per cent		89,749.67
		$688,080.82
Less cash paid by United States Government on account of above contract		142,959.10
		$545,121.72

Or if the Court should not consider the theory upon which the above statement "A" is based to be correct, then in any event "B," as follows:

"B."

Extra cost of dredging operations on Delaware River contract with United States Government, dated December 18, 1912—	
For towing	$69,720.06
For coal	41,736.73
For pay rolls	109,722.84

For general operating expenses, including repairs to plant, supplies, traveling expenses, insurance, etc		$120,329.56
For supervision 2½ years		12,500.00
		$354,009.19
For use of plant—		
Finn McCool, 4 mo. 5 da	$6,250.00	
Dredge Colonel, 33 mo. 4 da	33,133.32	
Dredge Edw. M. Harris, 33 mo. 4 da	33,133.32	
Dredge Defender, 28 mo. 3 da	56,200.00	
Dredge Canton, 12 mo. 27 da	19,350.00	
Tug Frances, 12 mo. 27 da	6,450.00	
Tug Alice, 28 mo. 14 da	14,233.32	
Scows from beginning of contract to Jan. 1, 1916	75,572.00	
		244,321.96
		$598,331.15
Add for overhead charge, office expenses and profit, 15 per cent		89,749.67
		$688,080.82
Less estimated cost of dredging 1,340,000 cu. yds. material had it been mud with an admixture of sand		107,200.00
		$580,880.82
Less cash paid by United States Government on account of above contract		142,959.10
Balance due—Loss		$437,921.72

(35) No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

No person or corporation other than claimant has any interest in this claim except said Sanford & Brooks Company, Inc., for the benefit of which company this suit is prosecuted to the extent of the amount of which said Sanford & Brooks Company, Inc., is entitled under and by virtue of the contract between claimant and
16 said Sanford & Brooks Company, Inc., for the completion of said work hereinbefore referred to.

(36) And no other assignment or transfer of this claim, or any part thereof or interest therein, has been made.

(37) Claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. Claimant has at all times borne true allegiance to the Government thereof, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government; and claimant believes the facts stated in this petition to be true.

And claimant prays judgment for five hundred and forty-five thousand, one hundred and twenty-one dollars and seventy-two cents ($545,121.72).

ATLANTIC DREDGING CO.,
By WALTER B. BROOKS, Agent,
Claimant.

WILLIAM L. MARBURY,
Attorney for Claimant.

Copy.

17 EXHIBIT A.

Improving Delaware River, Pa., N. J., and Delaware.

(Philadelphia, Pa., to the Sea.)

ADVERTISEMENT.

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE,
815 WITHERSPOON BUILDING,
Philadelphia, Pa., October 8, 1912.

Sealed proposals for dredging in Delaware River, below Philadelphia, will be received at this office until 12 o'clock noon, November 8, 1912, and then publicly opened. Information on application.

JOSEPH E. KUHN,
Lieutenant Colonel, Engineers.

GENERAL SPECIFICATIONS.

1. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. All bids and guaranties must be made in triplicate upon printed forms hereto attached, copies of which may be obtained at this office.

3. Each individual guarantor will justify in an amount equal to (10) per centum of the total bid. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Statutes 487, Chap. 120, and is expressed in the guaranty attached to the bid.

18 4. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount approximately equal to and not less than fifty (50) per centum of the estimated consideration of the contract within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guaran-

tors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract. The right is reserved to reject any or all bids, and to waive any informalities in the bids received.

5. The proposals and guaranties must be placed in a sealed envelop marked "Proposals for dredging in Delaware River, to be opened November 8, 1912," and inclosed in another sealed envelope addressed to Lieutenant Colonel Joseph E. Kuhn, Corps of Engineers, 815 Witherspoon Building, Philadelphia, Pa., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

6. Whenever the term "contracting officer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, United States Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

19 8. The contractor will not be allowed to take advantage of any error or omission in these specifications as full instructions will always be given should such error or omission be discovered.

9. It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for any damage or injury done by or to them from any source or cause.

10. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. The contractor will be required to discharge any employee who, in the opinion of the contracting officer, is objectionable or incompetent. Such discharge shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, who shall be clothed with full authority to act for him in all cases, and to carry out any instructions relative to the work which may be given by the contracting officer, either personally or through an authorized representative.

13. No work shall be done on Sundays or on days declared by Congress as holidays for per diem employees of the United States, except in cases of emergency, and then only with the consent of the contracting officer; nor shall any work be done at night unless authorized in writing by the contracting officer.

14. Each contractor will be required to commence work under his contract within sixty (60) days after the date of receipt by him of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the work at an average rate of not less than 125,000 cubic yards, scow measurement, per month in each of the areas covered by his contract, and to complete the work in each area within the time determined by applying to the total quantity of material actually removed from each area under the contract, the average monthly rate stated above: *Provided*, That each contractor will be required to so conduct his work that at the end of each month during the life of the contract, the total progress in each area from the beginning of the contract to the end of that month shall be not less than that required by the above stipulated monthly rate: *And provided further*, That no waiver by the contracting officer of any failure of the contractor to make in any month or series of months the rate of progress required by this paragraph shall be construed as relieving the contractor from his obligations to make up the deficiency in future months, and to complete the entire work in the time allowed by the contract. (See paragraph 16.)

Bidders are informed that it is desired that all work contemplated under these specifications shall be completed during the working season of 1913, and that contract will not be awarded to any one contractor for a greater amount of work than he has facilities to accomplish within the period mentioned.

15. Payments will be made monthly for work done as specified during the month preceding payment. A percentage of ten (10) per centum will be reserved from each payment until the final completion and acceptance of the whole work.

DETAILED SPECIFICATIONS.

1. DESCRIPTION OF THE SITE AND WORK.

16. Location.—The areas which it is proposed to dredge are located between the West Horseshoe and Bellevue lighthouse ranges, inclusive, at distances of from about 5 to 25 miles below Philadelphia. A channel 600 feet wide and 30 feet deep at mean low water has been excavated by previous operations, but has since shoaled to some extent. Dredging is proposed at the following areas:

(1) West Horseshoe Range. The dredging will extend from Station 45+181 opposite Howell Cove, New Jersey, to Station 55+144, nearly opposite the mouth of the Schuylkill River, a distance of

9,963 feet. The quantity of material to be excavated is estimated to be 1,294,000 cubic yards, scow measurement.

(2) Mifflin Range. The dredging will extend from Station 56+295, opposite the mouth of the Schuylkill River, to Station 71+435, opposite the mouth of Mantua Creek, a distance of 15,140 feet. The quantity of material to be excavated is estimated to be 1,530,000 cubic yards, scow measurement.

(3) Lower end of Mifflin Range, connecting range, and upper end of Tinicum Range. The dredging will extend from Station 71+435, Mifflin range, to deep water on connecting range, at about Station 77+800, and from deep water at the upper end of Tinicum Range, at about Station 80+800, to Station 88, nearly opposite Du Pont's upper wharf at Thompson's Point, New Jersey, and will include the widening of the bends to 1,000 feet at the intersection of Mifflin and connecting ranges and at the intersection of connecting and Tinicum Ranges. The quantity of material to be excavated is estimated to be 1,340,000 cubic yards, scow measurement.

(4) Bellevue Range. The dredging will extend from Station 144+021, at the intersection of Bellevue and the present Schooner Ledge lighthouse ranges, to Station 155, opposite Gordon Heights, Delaware, a distance of 10,979 feet. The quantity of material to be excavated is estimated to be 2,100,000 cubic yards, scow measurement.

22 The stated amounts include dredging to a depth of 35 feet, mean low water, and additional cuts to equal side slopes of 1 on 5.

17. Maps, data, etc.—The precise locations of the above mentioned areas are shown on maps marked "Delaware River, Survey for 35-foot channel," which maps, showing the latest soundings taken over the areas, may be seen at this office, and should be examined by intending bidders before submitting proposals.

The mean rise and fall of tide in these areas is from 6.0 to 6.4 feet, and the velocity of the normal tidal current is at the rate of from 1½ to 3 miles per hour.

The usual working season is from March 1, to December 31.

18. Work to be done.—The depth of cutting under these specifications will vary from nothing to as much as 20 feet on West Horseshoe range, 24 feet on Mifflin range, 9 feet on connecting range, 21 feet on Tinicum range, and 14 feet on Bellevue range, figured to the grade depth of 35 feet. The dredging will extend across the entire 800-foot width of the projected channel, except over four isolated areas within the limits of the channel on Mifflin range, and on connecting and the upper end of Tinicum ranges, where the shoal runs off into deep water. The lengths of channel to be dredged are as stated in paragraph 16.

The plane of mean low water will be determined from bench marks located at League Island and at Bellevue, Delaware. The bench mark at League Island is on a copper bolt in the south (river) end of sill of southernmost door in the east side of large brick machine

shop, along downstream side of Broad Street, inshore from Broad Street wharf. The elevation of this bench mark is 11.37 feet above mean low water. The bench mark at Bellevue, Delaware, is on a step cut in face of abutment of the P., B. and W. Railroad bridge over Quarry creek; it is on east end of south abutment
23 1.2 feet from east end of second course of stones and 6.1 feet below bottom of girder; its elevation is 10.57 feet above mean low water.

II.—CONDUCT OF THE WORK.

19. Disposal of excavated material.—The material excavated must be transported and deposited above high water, or in enclosed basins at places provided by the contractor and approved by the contracting officer.

In connection with the deposit of material above high water or in enclosed basins, the contractor must, without cost to the United States, construct and place weirs and sluices and operate them, and construct and maintain mud fences where directed, to the complete satisfaction of the contracting officer, so that there will be no appreciable loss of material. He must also construct and maintain in good condition all necessary banks and bulkheads without expense to the United States. He shall not deposit material upon private property without first obtaining written permission from the owners thereof. All dredging and preliminary work necessary to form dumping basins must be done without cost to the United States, and in a manner satisfactory to the contracting officer. Dredging basins must be dredged and mantained to such a depth and over such an area that the material dumped therein will not overflow their limits at any time.

Any material that is deposited elsewhere than in places designated and approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and depo-it it where directed. The dumping ground must be plainly marked by conspicuous buoys, ranges or stakes, and no dumping shall be done unless an inspector is present at the time, and the ranges, buoys or stakes are clearly visible.

24 20. Order of work.—The work is to be carried on at such areas and in such order of precedence as may be directed by the contracting officer. Lines will be plainly marked by stakes, range marks, piles, buoys, or other suitable method. Distinctly marked tide gauges will be established in view of each part of the work, so that the proper depths may at all times be determined. (See paragraph 29.)

The contractor may be required to suspend dredging at any time when for any reason the tide gauges or dredging ranges can not be seen or properly followed.

Night work will be permitted when it can be done in a manner satisfactory to the contracting officer, but unless it is so permitted no work shall be done before sunrise or after sunset. During the prog-

ress of night work the contractor shall maintain such lights as the contracting officer may deem necessary for clearly observing the dredging operations, and also make proper provision in all cases, at his own expense, for the comfort of the inspectors and other United States employees who may be engaged on the work.

21. Removal of logs, snags, etc.—The work to be done will include the removal of all obstructions to navigation, including wreckage, lumber, logs, snags, stumps, piles, boulders, or other material (except ledge rock) found within the limits of the work as it progresses, all of which shall be deposited on shore above high water or disposed of in some other manner not detrimental to navigation, as may be approved by the contracting officer. (See also last subparagraph of paragraph 27.)

22. Rate of progress.—Work must be commenced and prosecuted as provided in paragraph 14. If at any time after the date fixed for beginning work it shall be found that operations are not being carried on at a rate sufficient, in the opinion of the contracting officer, to secure completion in the contract time, the contracting officer shall have the power, after ten days' notice, in writing, to the contractor, to employ such additional plant or labor or to purchase such material as may be necessary to put the work in a proper state of advancement; and any excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This provision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into. The right is reserved to assume the capacity of the plant and force actually on the work as a measure of probable future progress.

23. Lights.—The contractor shall keep proper lights each night, between the hours of sunset and sunrise, upon all floating plant connected with the work, upon all ranges and other stakes in connection with it, when necessary, and upon all buoys large enough and so situated as to endanger or obstruct navigation, and shall be responsible for all damages resulting from any neglect or failure in this respect.

24. Obstructions.—The contractor will be required to conduct the work in such manner as to obstruct navigation as little as possible, and at the completion of the work shall remove his plant, including ranges and buoys, piles, etc., placed by him under the contract in navigable waters. In case the contractor's plant so obstructs the channel as to impede the passage of vessels, it shall promptly be so moved as to afford a practicable passage on the approach of any vessel.

25. Misplaced material.—Should the contractor, during the progress of the work, lose, dump, throw overboard, sink, or misplace any material, plant, machinery, etc., which, in the opinion of the contracting officer, may be dangerous to or obstruct navigation, he shall

recover and remove the same with the utmost dispatch. The contractor shall give immediate notice, with description and location, of such obstructions, to the contracting officer or inspector, and, when required, mark or buoy such obstructions until the same are removed. Should he refuse, neglect, or delay compliance with the above requirement, such obstructions may be removed by the contracting officer and the cost of such removal may be deducted from money due or to become due the contractor.

26

26. Liability of contractor.—The contractor will be responsible that his employees strictly observe the laws of the United States affecting operations under the contract. He will be expected to comply with the laws of the United States and of the State as to the inspection of boilers, hulls, etc., and the licensing of masters, engineers, etc. He shall conform to such sanitary requirements as may be prescribed by the contracting officer.

Any damage done to any bulkhead, plant, or other property belonging to the United States by the contractor's plant or employees, shall be immediately repaired and made good by the contractor without expense to the United States, and all expenses incurred by the United States due to time lost in repairing said damage shall be charged to the contractor, and deducted from any money due or to become due him under the contract. Should the contractor refuse, neglect, or fail to make such repairs, they will be made by the contracting officer, and the cost thereof deducted from sums due or to become due the contractor.

III.—QUALITY OR CHARACTER OF MATERIAL.

27. The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from Station 54 to Station 55 + 144, at the lower end of West Horseshoe range, where the material is firm mud, sand, and gravel or cobbles. Bidders are expected to examine the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

27

A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy.

The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock or outcroppings of sufficient size to be so classified.

Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include detached rock or bowlders capable of being raised in one piece. Should ledge rock be encoun-

tered, all overlying loose material shall be removed at the price bid for the general dredging.

IV.—PLANT.

28. Proposals will state the character and capacity of the plant proposed to be employed by the contractor. The plant shall be at all times kept in condition for efficient work and shall be subject to the inspection and approval of the contracting officer. The contractor will be required to maintain on the work a plant equal in capacity at least to that named in his proposal, and will not be permitted to withdraw from the work any portion of his plant without the written consent of the contracting officer. The contractor shall give immediate notice in writing to the contracting officer of the arrival upon or withdrawal from the work of any portion of his plant. All scows must be kept in good condition, the coamings kept repaired and the pockets provided with proper doors or appliances, so that no leakage of material may occur during transit from
28 the dredge to the dumping grounds. All pipe lines used on the work carried on pontoons or over navigable waters must be kept in good condition, and any leaks or breaks along their length promptly and properly repaired.

If, during the progress of the work, the contractor wishes to use plant other than was originally named by him in his proposal, and the methods of use of such plant entail an extra expense to the United States for cost of inspection, such extra cost of inspection shall be paid by the contractor, if so directed by the contracting officer.

V.—SUPERVISION.

29. The work will be conducted under the general direction of the contracting officer and will be inspected by inspectors appointed by him, who will enforce a strict compliance with the terms of the contract. The inspectors will keep a record of the work done, and see that the tide gauges, ranges, etc., are kept in proper order. The contractor will be required to facilitate the work of the inspectors in all possible ways and will furnish, on their request, such boats, boatmen, laborers, and material as may be necessary in laying out the work, inspecting or supervising the same. All ranges, stakes, tide gauges, sounding lines, buoys, and anchors, with rope and other materials needed for the proper execution and inspection of the work, will be furnished, set and maintained in good order by the contractor. The cost of transportation of United States employees engaged upon the work is to be included in the price bid for doing the work, and under this head the contractor will be required to furnish the services of a tug for the use of the chief dredging inspector for such time as may be needed in the performance of his duties, not to exceed an average of five hours per day. This tug may not be used exclusively in this service, nor, generally, in such man-

ner as to preclude its use by the contractor for general purposes, except that the chief inspector must be carried over the entire
29 field of operations at least once each working day.

30. Accommodations for inspectors, etc.—When required, approved board and lodging for the United States employees engaged on the work, equal in quality to those furnished dredge captains and runners, will be provided by the contractor, the board and lodgings to be paid for by the United States at the rate of fifteen cents for each meal and fifteen cents for each lodging.

VI. QUANTITY OF MATERIALS.

31. The total estimated quantity of material to be removed under these specifications is 6,264,000 cubic yards, scow measurement, in the four sections as described in paragraph 16, and the amounts stated will be used as a basis in canvassing bids. As much will be removed under this contract as can be accomplished with the funds available at the unit prices of the accepted bids. The area covered by the entire yardage to be removed has been divided into four parts, (1), (2), (3), and (4), with estimated yardages as stated in paragraph 16. In case the prices bid require a reduction of yardage, the reduction will be made on Bellevue range, from Station 155 upstream. In case the prices bid allow an increase of yardage, the increase will be made on Bellevue and the upper end of Cherry Island ranges, from Station 155 downstream.

The amount of money available for payment of contractor's estimates is about $900,000.00.

VII. MEASUREMENT AND PAYMENT.

32. The material removed will be measured by the cubic yard in scows at the dredge by inspectors appointed by the contracting officer, but the contractor will be held responsible for its satisfactory disposal, and proper deductions will be reported by the inspector
30 at the dump for all material that is not so disposed of. No scow will be used in the work until its capacity, when loaded, has been determined from measurements made under the direction of the contracting officer; and, if necessary, it must be hauled out or beached for this purpose. If any alterations are made in any scow it must be inspected, and, if necessary, remeasured, before again being used in the work. Each scow will be plainly marked by a distinctive number or letter, which shall not be changed or given to any other scow during the period of contract. To insure correct measurement, the pockets shall be evenly filled, as far as practicable, either to the bottom or top of coamings, but in case of dispute as to the amount in a scow the contractor may be required to level off the load. The judgment of the inspector as to whether or not a scow is full and, if not full, to what extent it is short, will be final unless the contractor submits an appeal in writing to the contracting officer within five (5) days thereafter.

33. When necessary for any reason to convert "scow measurement" into "place measurement," or the reverse, 100 cubic yards of soft mud in place will be taken as the equivalent of 105 cubic yards in scows, and for sand and gravel 100 cubic yards in place as the equivalent of 110 cubic yards in scows.

34. Overdepth dredging, shoaling, and side slopes.—To cover mechanical inaccuracies of dredging processes, material actually removed to a depth of not more than two (2) feet below the required depth will be estimated and paid for at full contract price; to secure stable blanks for the dredged cut, material removed in making side slopes not flatter than 1 on 5, whether dredged in situ or after having fallen into the channel limits, will be estimated and paid for; material taken from beyond the limits above described will be deducted from the estimates as excessive overdepth dredging or excessive side slopes, and will not be paid for. No payment will be made for material dredged outside the specified limits, as shown by
31 soundings, unless the same is specifically ordered in writing by the contracting officer before the excavation is made.

35. Surveys will be made over portions of the dredged channel completed for at least half of its specified width, in lengths of 1,000 feet or more, as soon as practicable after such portions of the channel are completed, and from the data so obtained the overdepth excavation, if any, will be estimated, as provided in paragraph 34. Surveys will not be made, nor work accepted over less area than one-half the channel width in lengths of 1,000 feet.

The work will be finally accepted when the lumps, shoals, or ridges developed by the survey, if any, are removed by the contractor and the portion of the channel to be accepted is clear of obstructions to the specified depth. The matter will not thereafter be reopened except on evidence of collusion, fraud, or obvious error.

Payments will be made by the cubic yard measured in scows at the place of deposit, as above provided for, unless the contractor elects in his bid to do the work by a method which does not entail the use of scows, in which event the material so removed will be measured in place, converted into scow measurement in accordance with paragraph 33, and paid for by the scow measurement so determined.

VIII. MISCELLANEOUS PROVISIONS.

36. Experience.—Bidders shall further state, on the form appended and in accordance with the directions thereon, whether they are now or ever have been engaged on any contract or other work similar to that proposed, the year in which it was done, and the manner of its execution, and shall give such other information as will tend to show their ability to prosecute vigorously the work required by these specifications. Any bid not complying with these instructions may be rejected.

32 37. Claims and protests.—If the contractor considers any work required of him to be outside the requirements of the

contract or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within five days thereafter or be considered as having accepted the record or ruling.

38. Minor modifications.—The right is reserved to make such minor changes in these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, and no increase in price shall be paid the contractor on account of such changes, except as provided in the form of contract to be entered into.

IX. PROPOSAL AND CONTRACT.

39. Bids will be submitted on blank forms to be obtained at this office. The form has an entry for each item of work or material on which estimates will be given or payments made, and no other allowances of any kind will be made unless specifically provided for in the specifications or contract.

A bid for the entire work must have each blank filled.

The quantities of each item of the proposal as finally ascertained at the close of the contract in the units given, and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.

The United States reserves the right to award any section of the work to the most favorable bidder.

Bidders are invited to state approximately the amount of work they are prepared to undertake in case their bid should be lowest on more than one area.

33 EXHIBIT B.

1. These articles of agreement, entered into this eighteenth day of December, nineteen hundred and twelve, between Lieut. Colonel Joseph E. Kuhn, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and the Atlantic Dredging Company, of Philadelphia, in the County of Philadelphia, State of Pennsylvania, hereinafter designated as the contractor, of the second part.

Witnesseth, That the said parties do hereby covenant and agree, to and with each other, as follows:

2. In conformity with the advertisement and specifications hereunto attached, and maps marked "Delaware River, survey for 35-foot channel," which form a part of this contract, the said contractor shall furnish all the necessary plant and labor and do the work of dredging in the Delaware River, at lower end of Mifflin range, connecting range, upper end of Tinicum range, and widening

the bends at ends of connecting range to a depth of thirty-five (35) feet below the plane of mean low water, a width of eight hundred (800) feet in the straight parts, and a width of one thousand (1,000) feet in the bends.

All material excavated and removed shall be deposited above high water or in enclosed basins, at places provided by the contractor and approved by the contracting officer.

It is understood and agreed that the said contractor shall, at all times, maintain upon the work a sufficient plant to insure the completion of the dredging within the contract time.

In consideration of the faithful performance and satisfactory completion of the above described work, the contracting officer
34 will pay to the contractor the sum of twelve and ninety-nine one-hundredths (12 99/100) cents per cubic yard, scow measurement, in full payments for all material excavated, removed and disposed of in accordance with this agreement.

3. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

4. The contractor shall commence, prosecute, and complete the work herein contracted for as set forth in paragraph 14 of the attached specifications.

5. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the contractor, and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the contractor whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the said United States in excess of those payable by the United States during the period herein allowed
35 for the completion of the contract by the contrator; and the contracting officer may deduct all of the above-mentioned sums out of or from any money or reserved percentage retained as aforesaid; and upon the giving of the said notice the contracting officer shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

6. If the contractor shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the contracting officer, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, may waive the time limit and permit the contractor to finsh the work within a reasonable period, to be determined by the contracting officer. Should the original time limit be thus waived, all expenses for inspection and sueprintendence, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: *Provided, however*, That no charge for inspection and superintendence shall be made for such period after the date of expiration of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no manner affect the rights or obligations of the parties under this contract.

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

8. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed, or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by

the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

9. The contractor shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

37 10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

11. The contractor shall hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

12. Payments shall be made to the contractor as prescribed in paragraphs 15 and 35 of the specifications hereto attached and forming part of this agreement.

13. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by the said contractor are reserved to the United States.

14. No Member of or Delegate to Congress, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise herefrom; but this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, is not to be construed to extend to this contract.

15. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

16. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

18. This contract shall be subject to the approval of the Chief of Engineers, U. S. A.

In witness whereof, the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

WITNESSES: R. C. Sutton, as to Joseph E. Kuhn, Lieut. Colonel Corps of Engineers, U. S. A.; C. C. French, as to Atlantic Dredging Co., John L. Grim, president. (Seal.)

(Executed in triplicate.)

Approved: February 28, 1913.

W. H. BIXBY,
Chief of Engineers, U. S. Army.

Exhibit C.

Whereas, on the 18th day of December, 1912, a contract was entered into between Lieut. Col. Joseph E. Kuhn, Corps of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the contracting officer representing the United States of America, of the first part, and the Atlantic Dredging Company, of Philadelphia, in the county of Philadelphia, State of Pennsylvania, hereinafter designated as the contractor, of the second part, for dredging in Delaware River, at lower end of Mifflin range, connecting range, upper end of Tinicum range, and widening the bends at ends of connecting range.

39 And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered; that the deposit of said heavy material in enclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in enclosed basins above high water will not be injurious to navigation.

Now, therefore, the said contract is, by this supplemental Agreement between Colonel Geo. A. Zinn, Corps of Engineers, U. S. Army, and the said contractor, on this 4th day of May, 1915, hereby modified in the following particulars, but in no others:

1. That all material excavated and removed under the said contract, other than mud, or mud with an admixture of fine sand, may be deposited in Delaware River at points above or below the Chester Island dike, or behind Tinicum Island, in the order named, and at locations to be indicated by the contracting officer.

2. That in consideration of the change in manner of disposal of said material the unit price of twelve and ninety-nine one-hundredths cents ($0.1299) per cubic yard, scow measurement, as originally agreed upon, shall be reduced in the sum of two cents ($0.02), and the said contractor hereby agrees to accept the sum of ten and ninety-nine one-hundredths cents ($0.01099) per cubic yard, scow measurement, in full payment for all material, other than mud, or mud with an admixture of fine sand, disposed of in the manner set forth in paragraph 1 above.

40 3. That nothing in this agreement shall be understood as affecting any of the provisions of paragraph six of said contract of December 18, 1912.

This supplemental agreement shall be subject to the approval of the Chief of Engineers, U. S. Army, and the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

WITNESSES: William Cameron, as to Geo. A. Zinn, Colonel, Corps of Engineers; C. C. French, as to Atlantic Dredging Company, Bret Hallock, secretary and treasurer. (Seal.)

(Executed in triplicate.)

Approved: May 24, 1915.

DAN C. KINGMAN,
Chief of Engineers, U. S. Army.

Approved: May 25, 1915.

HENRY BRECKINRIDGE,
Assistant Secretary of War.

CONSENT OF SURETY.

We, Edward M. Harris, of Philadelphia, Pa.; Wm. J. McWade, of Philadelphia, Pa.; and the Fidelity and Deposit Company of Maryland, of Baltimore, Md., bondsmen for the due performance of a contract dated December 18, 1912, between the United States, represented by Lieut. Colonel Joseph E. Kuhn, Corps of En-
41 gineers, U. S. Army, and the Atlantic Dredging Company, of Philadelphia, Pa., for dredging in Delaware River, at lower end of Mifflin range, connecting range, upper end of Tinicum range, and widening the bends at ends of connecting range, hereby give our full consent to the attached supplementary articles of agreement, dated May 4, 1915, providing for change in manner of disposal of dredged material, and a reduction in price originally agreed upon from twelve and ninety-nine one-hundredths cents ($0.1299) to ten and ninety-nine one-hundredths cents ($0.1099) per cubic yard, scow measurement, and we hereby agree that our bond shall apply to and cover the due performance of the original contract as modified and extended by said supplemental agreement.

In presence of M. F. Straus, as to Edward M. Harris (Seal); Leon Bellenghi, as to William J. McWade (Seal).

Attest:

FRANK R. WELSH [Seal],
Assistant Secretary.

FIDELITY & DEPOSIT CO. OF MARYLAND,
By CHAS. R. MILLER, *Vice President.*

(Executed in duplicate.)

42 II. *General traverse.*

Court of Claims.

ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT,
vs. No. 33240.
THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and submissi of case.*

On March 28, 1918, this case was argued and submitted on merits by Mr. William L. Marbury, for the claimant, and Mr. J. Harwood Graves, for the defendants.

43 IV. *Findings of fact, conclusion of law, and opinion of the Court by Hay, J., and disopinion by Campbell, Ch., J., in which Downey, J., concurs. Entered June 3, 1918.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of fact.

I.

The plaintiff, The Atlantic Dredging Co., a corporation duly organized and existing under the laws of the State of Pennsylvania, on December 18, 1912, entered into a contract with Lieut. Col. Joseph E. Kuhn, who was acting on the part of and in behalf of the United States, whereby the plaintiff agreed to dredge to a depth of 35 feet below the plane of mean low water a certain section in the Delaware River, designated in the specifications as "lower end of Mifflin Range, Connecting Range, and upper end of Tinicum Range," the width of said dredging to be 800 feet in the straight parts and 1,000 feet in the bends, for which dredging the defendants agreed to pay the plaintiff the sum of twelve and ninety-nine one-hundredths cents per cubic yard, scow measurement. The contract, specifications, and advertisement are filed with the petition and are made a part hereof by reference.

II.

In the year 1909, at a time when the project for deepening the channel of the Delaware River to 35 feet was before Congress, the "test borings" referred to in paragraph 27 of the specifications above mentioned were made by defendants' agents. They were made along the approximate center line of the proposed channel at 1,000-foot intervals, for the purpose of obtaining information on which to base an estimate of cost, and were made throughout a length of about 48 miles of the proposed channel. These "test borings" were made by forcing by hand pressure a long pole or spar with a hollow 1-inch iron pipe at the end into the river bed to grade, and the character of the material encountered was determined by the "feel" of the rod, and its location below mean low water was determined
44 by measurements marked on the rod itself. These "test borings" were numbered consecutively, and in the area embraced by plaintiff's contract were numbered from 111 to 120, inclusive. A record was kept of the result at each of said borings or probings, and the material indicated as being encountered by said method was correctly entered upon field notes. At several places in the entire area, and at two instances numbered 113 and 114 in the area included in plaintiff's contract, the probe struck hard, impenetrable material and would not go down under the method used. The fact was correctly recorded on the log or field notes at the time. A tracing or tracings were then made, upon which were correctly transcribed the data shown on the log or field notes, including the said information as to numbers 113 and 114 and other places where the probe had not penetrated. These tracings were forwarded to defendants' engineering office at Philadelphia. Subsequently, and in about two months after said probings were made, the said agents who made them repaired to the places where the probe had not penetrated and made borings at those places by a method known as "wash borings," which consisted in inserting a cylinder in the soil below and applying a jet of water through a pipe, which had the effect of bringing up the material below, and a correct record was made of the result of these "wash borings." This record was also sent to the said engineering office. Thereafter, when the map exhibited with the specifications submitted to the bidder was made, it showed the result of the said probings as reported by the parties who made them and shown upon said tracings, except at borings 113 and 114, where the map showed the result of the wash borings as reported. The map did not show the result of the probings at borings 113 and 114. The use of the probe and the use of the wash boring are each an approved method of ascertining the character of soil or material in dredging operations. There is a third method, known as "core borings," which would accurately determine the precise material to be encountered, but that method is not used to ascertain the character of material to be dredged. It is frequently used where superstructures are to be

placed. The probing method for ascertaining material to be dredged is an approved method and is the method universally adopted by the Government and contractors on the Delaware River.

The plaintiff, before executing the contract aforesaid, visited the office and examined the maps referred to in the specifications. Said maps contained a record of twenty-six borings, covering specified sections that were to be dredged, and of these 10 were in the section of the Delaware River which, by its contract afterwards made, the plaintiff agreed to dredge. Ten of said borings, according to the map of the defendants, indicated material as hereinafter shown. The map did not indicate the method used in making the borings. The map did not give the time when these borings were made, nor was it stated whether the borings were wash borings or core borings, or whether the boring was done by a probe. There was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made. The number of borings covering that section of the Delaware River embraced in the contract of the plaintiff were 111 to 120, inclusive.

On said map opposite Nos. 111 to 120, inclusive, under the heading "Material," were legends as follows: "No. 11, Frm. sdy. md." meaning firm sandy mud. "No. 112, Frm. sady. md., to 40.2 then hrd. gvl.," meaning firm sandy mud to 40.2 feet then hard gravel. "No. 113, loose gvl. to 38.1 then fine compact gvl. to 39.3 then coarse loose gvl." "No. 114, loose gvl. to 35.5, then compact gvl." "No. 115, sft. md. to 40.7 then sdy. md.," meaning soft mud to 40.7 feet then sandy mud. "No. 116, sft. md. to 39.8 then hrd. gvl.," meaning soft mud to 39.8, then hard gravel. "No. 117, sft. md. to 41.0 then frm. sdy. md.," meaning soft mud to 41 feet, then firm sandy mud. "No. 118, sft. md. to 41.2, then frm. sdy. md.," meaning soft mud to 41.2 feet, then firm sandy mud." "No. 119, sft. md. to 41.9 then frm. sdy. md.," meaning soft mud to 41.9 feet, then firm sandy mud. "No. 120, sft. md. to 40.6, then hrd. sd.," meaning soft mud to 40.6 feet, then hard sand. The plaintiff did not examine the site of the work for itself before making its bid, and had no information and made on inquiries as to the character of the material to be dredged except that given by the defendants on the map above described.

There was time between the dates of the advertisement and the proposals for a proposed bidder to make an examination of the area and to make probings in the manner in which the defendants had made them.

On November 8, 1912, plaintiff submitted a proposal to do said work at 12.99 cents per cubic yard by scow measurement, and its proposal, among other things, contained the following statement:

"We make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof."

III.

The legends on said map do not contain a true description of the character of the material which was encountered by plaintiff in the prosecution of work. The material to be dredged at the other borings was different from that shown on the map exhibited to bidders.

The statements in the specifications and drawings concerning the character of the material to be dredged were based upon the said data obtained from the tracings made by the Government's agents as aforesaid, and said probings and borings were made in good faith by the agents of the United States and were believed by them to correctly represent the character of the material through which the probe penetrated, and at the points where the probe had not penetrated to correctly show the character of the material where the wash boring method was used.

IV.

The plant which was brought on the work by the plaintiff was inspected and approved by the defendants, and was efficient for dredging the character of material which was mentioned in the specifications and described on the map, to which bidders were referred by defendants for information. But it was not efficient for dredging the material as it was actually found to exist. The plaintiff
46 secured the services of another concern to do the dredging for it, and that concern did all the work that was done.

V.

After plaintiff, or the concern it had employed, had been at work for some time upon the said dredging, the plaintiff complained of the character of the material which was being encountered, and after some correspondence a supplemental contract was entered into on May 4, 1915, between the parties relative to the prosecution of the work, and a copy of the supplemental contract is filed with the petition herein, marked Exhibit "C," and is made a part of these findings by reference.

VI.

The plaintiff began work at the downstream end of the section described in its contract, and encountered its greatest difficulty near the upper end of the section. The total quantity of material dredged by the plaintiff or its said agent was 1,437,469 cubic yards, which included 76,867 cubic yards of excess overdepth, for which latter quantity it was not paid. Said total quantity also included about 320,000 cubic yards of overdepth due to mechanical inaccuracies of dredging generally and dredged between planes 35 feet and 37 feet below mean low water. It was paid for this latter depth, and was

therefore paid the contract rate for a total of 1,360,602 cubic yards of dredged material. Of said latter amount, 584,801 cubic yards were dredged after the execution of said supplemental agreement, and of this quantity 205,320 cubic yards were deposited without rehandling.

At the time of making said supplemental agreement plaintiff was not aware of the manner in which the "test borings" over the area embraced in its contract had been made. In or about the month of December, 1915, the plaintiff learned that the borings had been made by the probing method above mentioned. The plaintiff thereupon discontinued work under the contract and declined to do further work, and at that time plaintiff had not been informed of the fact that impenetrable material had been reached by the probe as aforesaid. At that time when plaintiff ceased work there remained approximately 350,000 cubic yards of material to be dredged in the area covered by the contract. Thereafter the work was completed under the contract with the American Dredging Company, who bid for doing the same 16.2 cents per cubic yard, and was located in the vicinity of the borings 111, 112, 113, and 114.

The material actually dredged by plaintiff in the vicinity of the places where the borings were made was as follows: On the west of the center line in the vicinity of borings 111, 112, and 113 the material dredged showed a mixture of 24 per cent mud, 60 per cent sand, and 16 per cent gravel. No dredging was done in this vicinity of the east of said line. West of the said center line in the vicinity of boring 114 the material showed a mixture of 50 per cent sand, 45 per cent gravel, and 5 per cent clay. The dredging was only partially done at that vicinity, and none of the dredging in that vicinity was east of the said center line. At boring 115, and between that and 116, the material showed a mixture of 60 per
47 cent mud and 40 per cent on both sides of the center line. In the vicinity of boring 116 the material showed a mixture on the west of the center line of 25 per cent mud and 75 per cent sand, and on the east of the line a mixture of 27 per cent mud, 70 per cent sand, and 3 per cent gravel. In the vicinity of boring 117 the material showed a mixture of 25 per cent mud, 60 per cent sand, and 15 per cent gravel on the westerly side and 30 per cent mud and 70 per cent sand on the easterly side. At borings 118 and 119 the material showed a mixture of 50 per cent mud, 40 per cent sand, and 10 per cent gravel on the westerly side and 30 per cent mud and 70 per cent sand on the easterly side. At boring 120 the material showed a mixture of 60 per cent mud, 20 per cent sand, and 20 per cent gravel on the westerly side and 50 per cent mud and 50 per cent sand on the easterly side.

The dredging began in the vicinity of boring 120 on the west of the center line in June, 1913, and the plaintiff was engaged personally, or by its agent, in the vicinity of boring 120 to 118 from June, 1913, to July, 1914. Dredging was done in the vicinity of boring 117 between the dates of June, 1914, and March, 1915; in the vicinity

east of the said line. West of the said center line in the vicinity of boring 115 between July and November, 1914, and July and August, 1915; in the vicinity of boring 114 between May and August, 1915; in the vicinity of borings 113, 112, and 111 the work began in March, 1915, on the westerly side of the center line. The plaintiff did no dredging on the easterly side of the center line in the vicinity of borings 111 to 114, inclusive, but at boring 115, on the easterly side, the dredging was done between November, 1914, and May, 1915, and on the easterly side of boring 120 the dredging was done in March, 1915, at 117, 118, and 119 in April, 1915, and 116 in May, 1915. Redredging took place at divers times between July, 1914, and July and August, 1915.

VII.

The plaintiff actually expended in the prosecution of the work the sum of $354,909.19. It received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09.

Conclusion of law.

The court upon the foregoing findings of fact decides as a conclusion of law that the plaintiff is entitled to recover the sum of $211,050.09. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred and eleven thousand fifty dollars and nine cents ($211,050.09).

Opinion.

HAY, *Judge*, delivered the opinion of the court:

On December 18, 1912, the plaintiff entered into a contract with the defendants whereby it agreed to dredge to a depth of 35 feet below the plane of mean low water a certain section of the Delaware River, designated as lower end of Mifflin Range, Connecting
48 Range, and upper end of Tinicum Range. The width of said dredging was to be 800 feet in the straight parts and 1,000 feet in the bends. The plaintiff was to receive for its work 0.1299 cents per cubic yard, scow measurement.

The specifications, which were made a part of the contract, stated that the material to be removed is believed to be mainly mud, or mud with an admixture of fine sand except at certain stations which were fully described in the specifications. The specifications also stated that bidders were expected to examine the work and decide for themselves as to its character and to make their bids accordingly, "as the United States does not guarantee the accuracy of this description." Immediately following the above statement, and in the same paragraph of the specifications the following appears: "A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the result thereof may be seen by intending bidders on the maps on file in this office. No guaranty

is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy." The plaintiff before executing the contract visited the office and examined the maps referred to in the specifications.

These maps contained a record of ten borings covering the section of the Delaware River, which by its contract afterward made the plaintiff agreed to dredge. Eight of these borings, according to these maps, indicated that the only material encountered had been soft mud, or firm sandy mud, and the other two borings indicated that the material encountered was loose gravel. The maps did not indicate the time when the borings were made, nor was it stated whether the borings were core borings or wash borings, or whether the boring was done by a probe. There was nothing on the maps exhibited to bidders showing the field notes taken at the time the borings were made.

The numbers of borings covering that section of the Delaware River embraced in the contract of the plaintiff were 111 to 120, inclusive. On the map opposite numbers 111 to 120, inclusive, under the heading "Material," were legends which had for their purpose the description of the material found at the places where the borings had been made. Opposite No. 111 the legend was as follows: Firm sandy mud; opposite No. 112, firm sandy mud; opposite 113 and 114, loose gravel; opposite 115 to 120, inclusive, soft mud. The map also showed that the material, as indicated above, was in each case more than 35 feet below the plane of mean low water.

The plaintiff did not examine the site of the work for itself before making its bid or before executing the contract, and had no information as to the character of the material to be dredged except that given by the defendants on the maps, to which its attention had been directed by the defendants. The borings shown on the map of the defendants were made by them in the year 1909, three years before the contract of the plaintiff was executed.

The legends on said map did not contain a true description of the character of the material which had been encountered by the defendants when the borings were made over that section of the Delaware River which was embraced in the contract of the plaintiff.

49 These borings disclosed material much more difficult to dredge than that described on the map shown to the plaintiff for its examination and information. At the time the borings were made by the defendants their officers who made the borings took and recorded field notes, which were set down in a book kept for the purpose. At borings 113 and 114 these field notes showed that there was impenetrable gravel, through which the probe used by those making the borings could not penetrate; these notes were transferred to a tracing made by the defendants, but were not shown on the map which defendants exhibited to bidders for their information. The books containing the field notes as to the other borings in the section embraced in the contract of the plaintiff could not be

found. It appears from the evidence in the case that the character of the material at these borings was not that shown on the map exhibited to bidders, but was of a more difficult character for dredging.

There are three kinds of borings in use to ascertain the character of material to be dredged, to wit, core borings, wash borings, and borings by forcing a rod into the bottom by hand to the necessary depth, the character of the material encountered being determined by the feel of the rod, and the location below mean low water is determined by measurements marked on the rod itself. The method of boring which determines accurately the character of material to be dredged is that known as core boring; the other two methods above mentioned do not determine accurately the character of the material to be dredged. The method used by the defendants in this case was the third method above described as to all of the borings embraced in the contract of the plaintiff, except borings 113 and 114, in which the defendants made wash borings.

The character of the material in the area covered by the plaintiff's contract, and which the plaintiff encountered in its work on said contract, was difficult to dredge and consisted mostly of compacted sand and gravel mixed with clay and cobbles. The plant which was brought on the work by the plaintiff was inspected and approved by the defendants and was efficient for dredging the character of material which was mentioned in the specifications and described on the map to which bidders were referred by defendants for information.

Before the plaintiff knew that at the time of the execution of the contract the defendants had knowledge that the character of the material to be dredged was different from that shown on the map exhibited to plaintiff for its information, the plaintiff on May 4, 1915, entered into a supplemental contract with the defendants by which it was agreed that all material excavated and removed under the contract, other than mud, or mud with an admixture of fine sand, might be deposited in Delaware River at locations to be indicated by the contracting officer, and further agreed in consideration of the change in manner of disposal of said material, that the unit prices per cubic yard should be reduced in the sum of 2 cents.

On December 15, 1915, the plaintiff refused to go on with the work, although he did not then know that the map which was exhibited to bidders did not disclose a true record of the character of material which had been encountered when the borings were made. Nor did it discover this fact until after the bringing of this suit.

The total amount of material actually dredged and removed
50 by the plaintiff under the contract was 1,437,469 cubic yards, and the amount of material remaining to be dredged after the plaintiff ceased work was 400,000 cubic yards.

The plaintiff expended in the prosecution of the work the sum of $354,009.19; it received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09.

The plaintiff brings this suit for the extra cost of dredging operations under its contract with the defendants to do certain dredging in the Delaware River, and bases its claim for recovery on a charge of misrepresentation in the specifications and drawings as to the character of the material which it was to dredge and remove under the contract.

The contention turns upon the language used in the specifications, which is fully set out above. The plaintiff claims that when invited to bid on the work it examined the map which was exhibited to bidders for their information by the defendants, and that said map stated that the material to be dredged was loose gravel and soft mud, but that the material which was actually to be excavated consisted of compacted sand and gravel, mixed with clay and cobbles, and that such material was more difficult and expensive to excavate and dredge than was the material described on the map; that the borings were made by officers of the defendants; that the existence of the more difficult material was known to them; that the statement in the specifications was untrue in fact, causing the plaintiff to propose to do the work upon the basis shown by the map; that the plaintiff relied wholly upon the information furnished it by the defendants; that it expended the sum of $211,050.09 over and above the amount paid it under the contract; that it was led to expend this sum of money by the untrue statements made to it, and relied upon by it; and that it had the right to rely upon these statements, and was not obliged to make any investigation for the purpose of showing that these statements were false.

We think that the evidence sustains the contention of the plaintiff. It establishes that the borings were made by the officers of the defendant; it also establishes the fact that the defendants made specific statements as to the character of the material to be dredged, and that the material which was actually dredged by the plaintiff was different from that described in the specifications of the defendants, and that the existence of this more difficult material was known to the defendants.

It is also established from the evidence that the plaintiff relied wholly upon the information furnished it by the defendants.

It appears that there was a deceptive representation of the material to be dredged, and that the plaintiff was misled by it. The officer making the contract which we are considering was authorized to make it, and the plaintiff in its dealings with him had a right to rely on any representation made by him which related to the subject matter of the contract. The plaintiff was told that the character of the material was loose gravel and soft mud. That was a positive statement of the character of the material which was to be dredged, and the plaintiff had a right to rely on the representation so made, for it was so worded as to create and justify the belief that it was intended to enter into and qualify the contract. It was a representa-

tion which amounted to a warranty, particularly, as in this
51 case, the defendants knew and spoke with authority as to the character of the material, while to the plaintiff its character was unknown, and it could not protect itself by mere observation and dealt with a material which was hidden from view.

It is contended by the defendants that the specifications did not guarantee the character of the material described, and only stated what was believed to be its character, and that the plaintiff should have made an investigation for itself and had no right to rely upon the information offered by the defendants. But the defendants in its specifications especially directed the attention of bidders to a map on file in their office which purported to disclose the character of the material to be dredged, and this map was based upon borings made by the defendants, the specifications stating: "A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the result thereof may be seen by intending bidders on the maps on file in this office. No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy." And on the map the character of the material is fully described, and set out with particularity. The statement thus made was unequivocal, and was set out in a document prepared for the guidance of bidders. It seems to the court that the bidder had a right to rely on information so given, and was not obliged to make an independent investigation of a fact which the Government had left in no doubt. United States v. Stage Company, 199 U. S., 414, 424. In the case of Hollerback v. United States, 233 U. S., 165, 172, a case similar to this, where the question as to the right of the plaintiffs to rely on statements made by the defendants in specifications, setting out the character of the material to be dredged, the court said: "True the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log cribwork filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the Government might be presumed to speak with knowledge and authority." In this case the specifications spoke positively as to the character of the material to be dredged, and to that extent the statement must be taken as true and binding upon the Government. In its positive assertion of the character of the material the Government made a representation upon which the plaintiff had a right to rely without an investigation to prove its falsity. Hollerback v. United States, supra.

It is, however, insisted that the falsity of the statements made in the specifications as to the character of the material was not known to the contracting officer with whom the plaintiff contracted to do the work. But as was asserted in Christie v. United States, 237 U. S., 234-242: "It makes no difference to the legal aspect of the case that the omissions from the records of the results of the borings did not

have a sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive." In this case not only omissions from the records of the results of the borings were made but false statements of the character of the material were placed upon the maps, which
52 were exhibited to bidders for their information, and to which their attention was directed by the defendants.

This case is to be distinguished from the case of Simpson v. United States, 172 U. S., 372, in that the alleged warranty in that case related to the surafce indications of an available site open to the inspection and view of the plaintiff; but in this case the alleged warranty is as to the character of the material which was to be dredged, the composition of which was hidden from view. One related to the surface or site; the other refers to composition hidden from the view. A warranty will not extend to guard against defects plain and obvious to the senses of the contracting party; but the condition of the material in this case afforded no opportunity to the plaintiff to protect itself by mere observation, so that the warranty at the time it was made became operative upon the right of the parties. The Atlantic Dredging Company v. United States, 35 C. Cls., 463.

As to the plant which was brought upon the work by the plaintiff, it was approved by the defendants as efficient, and had the character of the material been such as was described in the specifications it was sufficient to have handled the work efficiently, and it does not seem that the defendants have any right to complain.

The plaintiff refused to go on with the work after it had dredged 1,437,469 cubic yards, claiming that the specifications only called for the dredging of 1,340,000 cubic yards. Under the specifications the number of cubic yards to be dredged was, while stated in the specifications to be 1,340,000 cubic yards, only approximate and estimated as a basis for canvassing bids, and if the plaintiff did not do the dredging contemplated in the contract, and failed to excavate the material in that section of the river embraced in its contract, it could not for that reason alone excuse itself for refusing to fulfill its contract. But if the plaintiff had been induced to enter into the contract by representations as to the character of the material to be dredged, and upon which it was entitled to rely, and which turned out to be untrue, then at any stage of the work it had the right to stop work and to sue to recover for whatever amount might be justly due it for the work which it had already performed. Canal Company v. Gordon, 6 Wall, 561, 569; Atlantic Dredging Co. v. United States, 35 C. Cls., 463, 484; Lee v. United States, 4 C. Cls., 156, 163.

Upon the whole case the plaintiff has the right to recover the sum of $211,050.09, and for that amount judgment will be entered.

BARNEY, Judge, and BOOTH, Judge, concur.

CAMPBELL, Chief Justice, dissenting:

A contract for dredging a defined area was made, the work to be paid for at unit prices of twelve and a fraction cents per cubic yard. According to the measurements as they developed, the completed

work should have cost the Government approximately $189,000. The plaintiff did not perform his contract. He dredged approximately 1,360,000 yards and was paid therefor the prices called for by the original and supplemental contracts the sum of about $143,000.

53 To complete the work, involving the dredging of about 350,000 cubic yards left undredged by plaintiff, the Government paid to another contractor about $56,000, thus making a total expenditure of about $199,000. The contractor who finished the work bid and was awarded the contract to complete the work at its then most difficult stage at the rate of sixteen and a fraction cents per cubic yard. The plaintiff having been paid $142,959.10 for work done at contract prices, asks judgment for an additional sum of $545,121.72, and is by the judgment of the court awarded the additional sum of $211,050.09, making a total sum to plaintiff of $354,009.19. When to this is added the sum paid to complete the work which plaintiff by its two contracts undertook to do, it appears that the completed work will have cost the Government over $400,000 instead of $189,000 as originally contemplated and contracted for. To state it differently, the original contract price was 12.99 cents per cubic yard. The supplemental contract entered into after the plaintiff had ascertained the difficulties of which he complains reduced that price to ten cents and a fraction per cubic yard. The plaintiff abandoned the work, leaving a considerable part of the channel undredged, and for this a new contractor bid and was paid sixteen and a fraction cents per cubic yard. The plaintiff asks judgment for a sum which would make the dredging cost 40 cents per cubic yard instead of 12.99 cents per cubic yard, and the judgment in effect fixes the price at nearly 27 cents per cubic yard, though another contractor completed the work for about 16 cents per cubic yard.

This seems to me to be a strange result to flow from the contract and supplemental contract in this case.

The statute requires contracts such as the one in question to be in writing. The law further requires a public letting of such contract. It has been properly said:

"It must be borne in mind, however, that the law required the letting of contracts for public improvements to the lowest responsible bidder may be readily evaded if contractors are to be permitted, without seeking a rescission of them, to obtain the fruits of the contracts by performance and then secure extra compensation upon some theory of mistake such as is presented concerning the plan in the case at bar." Lentilhon v. City of New York, 102 App. Div. R., 548, 556, affirmed in 185 New York, 549.

The court must be careful not to make a different contract from what the parties made for themselves.

1. The plaintiff did not perform his contract or complete the work which by the same he undertook to do. He repeated his obligation to perform in a supplemental contract when the character of the material was known to him, and yet did not perform. He abandoned the work.

2. The supposed representations which are treated as in the nature of waranties do not amount to representations such as will sustain an action. At most they were expressions of opinion.

3. The measure of damages, if plaintiff could recover at all, can not be that which obtains in actions ex delicto at common law, because the court has not jurisdiction of cases "sounding in tort."

The facts show that several years prior to letting the contract for dredging in the Delaware River the Government had caused certain probings to be made, with a view of making an estimate upon
54 the cost of the dredging for the information of Congress. These were made by the method of using a probe, which was an approved method of ascertaining the character of the bottom. It consisted in sinking an instrument into the soil by hand pressure and determining from the "feel" the character of the material through which the probe passed. That method was used throughout the length of the proposed channel, about 18 miles in length, and the probings were made at intervals of about a thousand feet apart. A correct record was made of the results of these probings, and tracings were made therefrom, which correctly showed these results. At several places throughout the area the probe struck compacted material, which was impenetrable by the probe, and that fact was recorded on the field notes, and likewise on the tracing. Shortly after making these probings the same parties went again along the course at or near the places where the probe had struck the compacted material and used a system of what is called "wash boring," which brought up the character of the material. A correct record was made of what developed by the wash borings. At two of the places in the section covered by plaintiff's contract, namely, at borings Nos. 113 and 114, the probe had struck said compacted material, and at those places wash borings were subsequently made as stated. In making up the map, which was later submitted with the specifications to the proposed bidders, there were placed upon it the correct results of the probings at all places, except Nos. 113 and 114, and at those points there was on the map the correct result shown by the wash borings. It was not communicated to the bidders that the probes had struck the said compacted material at said two places. The specifications covered four sections. Plaintiff bid for and was awarded the contract upon the third section, designated as the lower end of Mifflin Range, connecting range and upper end of Tinicum Range. The length of the channel in the section involved was about 2 miles.

The following provisions of the general specifications attached to the contract are pertinent:

"7. It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

"(3) Lower end of Mifflin Range, connecting range, and upper end of Tinicum Range.—The dredging will extend from station 71+435, Mifflin Range, to deep water on connecting range, at about station 77+800, and from deep water at the upper end of Tinicum Range, at about station 80+800, to station 88, nearly opposite Du Pont's upper wharf at Thompson's Point, New Jersey, and will include the widening of the bends to 1,000 feet at the intersection of Mifflin and connecting ranges, and at the intersection of connecting and Tinicum ranges. The quantity of material to be excavated is estimated to be 1,340,000 cubic yards, scow measurement."

"The stated amounts include dredging to a depth of 35 feet, mean low water, and additional cuts to equal side slopes of 1 on 5.

"17. Maps, data, etc.—The precise locations of the above-mentioned areas are shown on maps marked 'Delaware River, sur-
55 vey for 35-foot channel,' which maps, showing the latest soundings taken over the areas, may be seen at this office, and should be examined by intending bidders before submitting proposals.

"The mean rise and fall of tide in these areas is from 6 to 6.4 feet, and the velocity of the normal tidal current is at the rate of from 1½ to 3 miles per hour.

"The usual working season is from March 1 to December 31.

"21. Removal of logs, snags, etc.—The work to be done will include the removal of all obstructions to navigation, including wreckage, lumber, logs, snags, stumps, piles, bowlders, or other material (except ledge rock) found within the limits of the work as it progresses, all of which shall be deposited on shore above high water or disposed of in some other manner, not detrimental to navigation, as may be approved by the contracting officer. (See also last subparagraph of par. 27.)

"27. The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from station 54 to station 55–144, at the lower end of West Horseshoe Range, where the material is firm mud, sand, and gravel, or cobbles. Bidders are expected to examine the work, however and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

"A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office (see par. 17). No guarantee is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy.

"The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock or outcropings of sufficient size to be so classified.

"Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting

for its removal, and shall not include detached rocks or bowlders capable of being raised in one piece. Should ledge rock be encountered, all overlying loose material shall be removed at the price bid for the general dredging."

The contract makes the specifications a part of it by reference. Section 8 of the contract provides:

"No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers."

The plaintiff began the work after the approval of the contract, in February, 1913, and on the 4th of May, 1915, a supplemental contract was made, in which it is stated as a reason for the modifications of the original contract as follows:

56 "That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered; that the deposit of said heavy material in inclosed basins above high water is attended with extreme difficulty calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in inclosed basins above high water will not be injurious to navigation."

By the supplemental contract there was a reduction of 2 cents per cubic yard scow measurement.

The plaintiff suspended work in December, 1915, after having dredged approximately 1,360,602 cubic yards, for which he was paid at the contract rates. Of this latter amount about 585,000 cubic yards were dredged after the execution of the supplemental agreement. There remained to be dredged after plaintiff abandoned the work about 350,000 cubic yards of material, and this was subsequently dredged by another contractor, who bid and was paid therefor at the rate of about 16 cents per cubic yard.

The evident intention of the petition is to draw a distinction between the probings which were made and "borings." The specifications denominate them "test borings." The specifications also speak of them as soundings (see par. 17), and the statement relied on by plaintiff is that the Government had made "a number of test borings" in the areas where dredging was to be done. It is alleged that upon ascertaining the fact that "borings" had not been made, the plaintiff suspended work.

The theory upon which the petition proceeds is stated in section 10 substantially as follows: That claimant understood from the specifications that the Government "did not intend to warrant the material to be dredged to be 'mainly mud, or mud with an admixture

of fine said,'" but that claimant "did understand that the Government believed that such was the character of the material" and did understand that it had information in its possession sufficient, in its opinion, to justify such a belief, and that included in that information was the information furnished by the specimens of the material which had been obtained through test borings made by the Government in the usual way for the purpose of ascertaining in the most direct and certain manner the character of said material, and that knowing that the Government had been having dredging done in the channel of the Delaware River at this point for a long time prior to the date of said advertisement, and that it had had ample opportunities for and means of making itself acquainted with the real character of the channel, and that therefore "if the Government believed the material to be removed from the area in question" to be as above stated, "there was very little likelihood that the material was other than what the Government believed it to be," and little risk involved in assuming that the Government's belief was well founded, and that it made its bid for said work in reliance upon said representations of the Government with regard to the character of the material to be removed.

The facts show that probings had been made and that these are an approved method of making "test borings," that is to say, they
57 are made for the purpose of ascertaining the general condition of material to be dredged, the only other method which is used being what is called "wash borings." The evidence establishes that probing is the method used on the Delaware River to ascertain the character of material below.

It is apparent that the facts rebut the theory of the petition that there were no "test borings." As has been said, probings were made, and the specifications speak of the latest "soundings." If the idea be that the plaintiff was misled by the term "test borings," it is plain that no recovery could be predicated upon that misleading statement, unless the term was used with the intention to mislead the plaintiff. (Simon v. Goodyear Co., per Judge Lurton, 165 Fed., 573, 577.) There is no proof that they were used with any such purpose, and on the contrary the facts show that the parties acted in good faith. Nor do the facts found otherwise establish a case authorizing a recovery. A fact found, and of which plaintiff had no information prior to the taking of evidence, is that at two places in the area included in his contract the probe developed hard and material.

In this connection it may be said that it is a mistaken view that the Court of Claims must try all cases upon the facts developed regardless of the allegations of a petition. It is sometimes forced into this situation by the failure of defendants to interpose a demurrer. The statute (sec. 159, Judicial Code) requires the plaintiff in all cases to fully set forth the claim in his petition. Section 165 provides that when it appears to the court in any case that the facts set forth in the petition do not furnish any ground for relief it shall

not authorize the taking of proof therein. Cases are frequently submitted upon demurrer, and appeals have been prosecuted from the court's judgment sustaining a demurrer. The case of Thompson, Administrator, decided by the Supreme Court April 15, 1918, is the latest illustration of this. The rules of the court require a plain, concise statement of the facts, free from argumentative, irrelevant, or impertinent matter in the petition. It is not unusual for the court to require the plaintiff to make more specific his petition. All of the judges are agreed that it is within the power of the court to require the plaintiff's case to be stated in the petition. In the instant case, which was not called to the court's attention until after all the proof was taken and it was submitted upon the petition and proofs, we must consider it as presented and determine what is the case made by the facts.

The petition is drawn with more than usual care. The gravamen of it is misrepresentation inducing a contract.

In an action between individuals brought to recover damages on account of fraud or misrepresentation by which a party has been misled into making a contract, the controlling principles of law are well settled. The only possible difference that can exist between the rights of a plaintiff as against an individual and his rights as against the Government where fraud or misrepresentation is relied upon must be found in the terms of the statute whereby the Government had consented to be sued in the Court of Claims. It has not consented to be sued in "cases sounding in tort."

When a party ascertains that he has been induced to make a contract by fraud or misrepresentation, he has a choice of reme-
58 dies. He may rescind the contract or he may affirm it. He can not, however, do both. It is as difficult to do both, says Judge Sanborn in Wilson v. Cattle Ranch Co., 73 Fed., 994, "as it is to ride at the same time two horses that are traveling in opposite directions." Kingman v. Stoddard, 85 Fed., 740; Simon v. Goodyear Co., 105 Fed., 573; Smith v. Bolles, 132 U. S., 125. The principles announced in Wilson v. Cattle Ranch Co., supra, are approved by the Supreme Court in Sigafus v. Porter, 179 U. S., 116, 123.

In Kingman v. Stoddard, supra, Judge Jenkins made a careful examination and analysis of the authorities. He says:

"The rule is well settled that one who has been induced, through fraud, to enter into a contract has the election either to rescind, tendering back that which he has received, or, affirming the contract, he may have his action for deceit to recover the damages sustained. We, however, understand this rule to have application to a contract executed wholly or in part, and that the affirmance here spoken of has relation to the completed transaction; that is to say, if rescission be desired, and restoration of that received be not made, the contract is affirmed as to whatever has been done under it, and the defrauded party may still have his action for deceit. But we also understand the rule to be that if he become advised of the fraud perpetrated upon him in season to recede from his engagement and yet, with

knowledge of the falsity of the representations which had induced the contract, elects to perform, and clearly manifests his intention to abide by the contract, he condones the fraud, and is without remedy. * * * With respect to an executory contract, one may not, after knowledge of the fraud, continue to carry out, exacting performance from the other party to it, receive its benefits, and still pursue an action for deceit; and this because continued execution with knowledge of the fraud signifies the ratification of a contract voidable for fraud, and condones the fraud." * * * And further, "With respect to an executory contract, voidable by reason of fraud, the defrauded party, with knowledge of the deceit practiced upon him, may not play fast and loose. He can not approbate and reprobate. He must deal with the contract and with the wrongdoer at arm's length. He may not, with knowledge of the fraud, speculate upon the advantages or disadvantages of the contract, r ceiving its benefits and at the same time repudiate its obligation." Kingman v. Stoddard, 85 Fed., 740, 746; Fitzpatrick v. Flannegan, 106 U. S., 648.

Having thus the right of election, a plaintiff who has been induced to enter into a contract by fraud or misrepresentation may, on affirming it, sue for damages. If the contract be an executed one, he may sue for the false representation, keeping what he has, and at common law, if the contract contains terms referring to the subject matter of the representations, he may sue upon the contract, or may sue in tort for the deceit. Where, however, the contract is executory, the party, upon ascertaining the fraud, has the option of going on with it or not as he chooses. "If he executed it, the loss happened from such voluntary execution, and he can not recover for a loss which he deliberately elected to incur." Simon v. Goodyear Co., 105 Fed., 573, 579. If he elect to perform, he must adopt the whole transaction or no part of it. He can not affirm what is for his advantage and repudiate the rest. An action for damages caused
59 by fraudulent representation which induced a contract affirms the contract and relies upon it, and therefore may be subject to the same defenses as an action brought directly upon the contract. National Bank & Loan Co. v. Petrie, 189 U. S., 423, 425.

Where the contract is executory, the party misled has a right of action, but at common law the form of the action becomes material in that event. The general rule is that where a party has not performed his contract and has abandoned the work, he can not recover upon the contract. Dermott *v.* Jones, 2 Wall., 1; S. C. 23 How., 220, 233; Cutter *v.* Powell, 2 Lead. Cases, 1, 33, 51.

An obstacle to the maintenance of his action where the contract is executory is that he can not aver performance on his part. He is not, however, without remedy because at common law he could still have his action for the deceit, and that was the form of action adopted in most of the cases above cited.

What then is the case submitted on the petition and proof? It may be summed up as follows:

(1) That the defendants represented that they had made "test borings" when in fact probings had been made. But probings come within the designation of test probings as used in the specifications, because it is the method adopted on the Delaware River, of which the plaintiff must have notice, or because it is not shown that there was any intention, by the use of the term, to mislead the plaintiff.

(2) That they represented that they "believed" the character of the material to be mainly mud, or mud with an admixture of fine sand. This was coupled with a positive declaration that the Government would not guarantee the accuracy of the designation and that bidders must satisfy themselves. They had ample time in which to make their own investigation.

(3) That, as shown by the proof, the probe at two places had encountered compacted material which it did not penetrate, and that fact was not communicated to the plaintiff.

The petition makes it quite plain by its tenth paragraph that the plaintiff understood that the Government did not intend to warrant the material to be dredged to be mainly mud or mud with an admixture of fine sand. It is also averred that the plaintiff had a plant which was adapted for dredging the material named but was inefficient to dredge the material found to exist, and that (see par. 24) "from the very beginning of the work the material encountered by plaintiff" was mainly material considerably more difficult to remove than mud or mud with an admixture of fine sand would have been.

If the representation went to the character of the material, it is plain that plaintiff knew of the mispresentation "from the very beginning," and under the authorities above cited it was his duty then to have suspended, because continuance in the work after discovery of the misrepresentation waived the same and does not afford a right of action. This is made quite plain by Judge Lurton in Simon *v.* Goodyear Co., supra.

The gist of the matter is the character of the material. The representation as to test borings, taken in connection with the other statements made in the specifications, excludes the idea that there was any intention to represent the character of the material. This
60 fact is admitted in the tenth paragraph of the petition. And when asked to construe the statement by the defendants to be a positive representation, binding upon them, what is to be said about the representation made by the plaintiff, who, in submitting its proposal to do the work at twelve and a fraction cents per cubic yard, said: "We make this proposal with a full knowledge of the kind, quantity, and quality of the work required"? That statement, made before the contract was executed, would be as reasonably binding upon the plaintiff, and therefore as inducing the action of the defendants, as the statement of the defendants was when qualified by the language they used.

But apparently the plaintiff does not rely upon that feature. The gravamen of his action is that the Government made a misrepresenta-

tion, either with reference to the test borings or to its belief as to the character of the material or in its concealment of a fact. There is nothing in the specifications to show that the defendants stated or undertook to communicate to plaintiff all information in their possession, as was the Christie case, infra. The fact of compacted material having been found can therefore only go to that phase of the representation that they "believed" the material to be of a certain character.

To maintain his action the plaintiff must not only show a positive representation which misled him, but a representation upon which he had a right to rely and did rely. Unless no effect be given to the language of the specifications, there could be no reliance placed by the plaintiff upon the defendants' representation, if it can be so called. The rule announced in the Simpson case, 172 U. S., 372, is a salutary one that should not be lightly passed over. It controls the instant case.

With full knowledge of the character of the material to be dredged, the plaintiff continued at work for more than a year and then made a supplmental contract whereby the price he was to receive was reduced on account of the fact that he was relieved from handling the heavier material in the manner prescribed by the original contract. He thereafter continued under the supplemental contract the work for many months. So far from making a positive representation as to the character of material to be dredged, the defendants excluded that idea by the most positive terms, in that they said that "the United States does not guarantee the accuracy of this description."

This condition, as we have stated, is recognized by the petition in paragraph 10 thereof. The specifications informed the bidders that the work to be done would include the removal of all obstacles to navigation, and by section 8, that no claim whatever should be made on acount of extra work unless it was required in writing by the contracting officers. The facts fall far short of showing that the plaintiff had any right to rely upon the alleged representations. It requires no citation of authority to show that if the representation was an expression of opinion, it can not form the basis of an action, unless it be shown, as it is not in this case, that the opinion was expressed with the purpose or intention of misleading the bidder. This case is materially different from the Hollerbach case, 233 U S.., 165, and the Christie case, 237 U. S., 234. In the Hollerbach case
61 there was a positive representation as to the character of the filling back of the dam, and the plaintiff had to go through that filling in order to perform the work which he undertook to do. In the Christie case there was a positive statement that the material to be excavated, "as far as known," was shown by probings, and it developed that all the information which the defendants had from the probings was not communicated to the claimant. The statement, however, was positive. In that case also there was not time for the plaintiff to make an independent investigation, and in the instant

case there was such time. The material encountered in *both of the* cases was an incident to the general work to be performed under the contract, and therefore the going through a filling in the dam or the removal of logs in the river were things that had to be done in order to perform the contract. In the instant cast there was no positive representation as to what the material would be, and when it is borne in mind that the probings were 10 in number, about a thousand feet apart, and therefore extending over an area of nearly 2 miles, that the material to be dredged was of that length, and 600 or more feet in width, it seems impossible to conclude that those probings or borings should be taken as representations by the defendants that the material to be dredged was of the character shown by the probings. Groton Bridge Co. *v.* A. & B. Ry. Co., 31 So. Rep., 739.

Nor is this case ruled by Atlantic Dredging Co., 35 C. Cls., 463. In that case there was a positive representation as to the character of material. The plaintiff suspended work and the Government brought suit in the Circuit Court for the Eastern District of New York, after finishing the work, to recover the difference between what plaintiff had agreed to do the work for and the Government had paid to have it done. The contractor prevailed in that suit, and later brought an action in this court to recover a retained percentage held by the Government and also damages. The court treated the question as res adjudicata, and held that the Government was estopped to make certain defenses. The plaintiff was allowed to recover the profits he alleged he would have made if the material had been as represented. The court treated the representation as a warranty and applied the rule of damages applicable in suits upon warranties. The measure of damages thus adopted is open to question. Sigafus v. Porter, 179 U. S., 116, 123; Huganir v. Cutter, 102 Wis., 323. In a subsequent case, Lewman, 41 C. Cls., 470, which is much more like the instant case than the Atlantic Dredging Company case (35 C. Cls.) is the latter is distinguished. Burgwyn case, 34 C. Cls., 348. See also Ferris case, 28 C. Cls., 332.

Another question appears to arise in this case if it be assumed that the plaintff, if his action were between individuals, would have a cause of action. While three of the judges concur in the view that the plaintff is entitled to recover, three of the judges agree that by the petition as well as the facts relied upon there is presented an action ex delicto, one of the judges holding the view that whether the action be ex delicto or not it can be maintained as being for a claim founded upon a contract, express or implied. The question therefore arises as to whether this court has jurisdiction. Section 145 of the Judicial Code confers jurisdiction to hear and determine claims
62 founded "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United

States, either in a court of *law, equity, or admiralty, if the* United States were suable."

It being the duty of all courts to recognize the limits of their authority (Reid's case, 211 U. S., 529), it is essential that the court observe the line of demarcation between cases of which it has jurisdiction and those of which it has not jurisdiction, because "judicial duty is not less fitly performed by declining ungranted jurisdiction that in exercising firmly that which the Constitution and the law confer." Ex parte McCardle, 7 Wall. 506, 515.

In Gibson's case, 29 C. Cls., 18, where the court considers the Tucker Act (sec. 145), it is said:

"The restriction of the jurisdiction of the court to contracts, express or implied, has, in the judgment of the Supreme Court, recognized the well-understood distinction between matters ex contractu and those ex delicto, and has excluded from the consideration of the court cases which are founded upon wrongs and such as can be adjudicated only in the form of an action ex delicto." Lanman's case, 27 C. Cls., 260.

In Langford's case, 101 U. S., 341, 345, the question is considered, and it is said:

"And it would ill become us to fritter away the distinction between actions ex delicto and actions ex contractu, which is well understood in our system of jurisprudence."

In Hill's case, 149 U. S., 593, 598, the cases are reviewed and the doctrine of the Langford and the Jones cases (131 U. S., 1) is repeated, the court saying:

"The United States can not be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract."

See also Bigby's case, 188 U. S., 400, 406.

"Nor is the difference merely formal or technical between actions founded in tort and in contract." Garland v. Davis, 4 How., 131, 144.

In Dooley's case, 182 U. S., 222, the action was sustained not upon the theory of any contractural relation but because the action was founded upon a law of Congress. That case was considered in Basso's case, 239 U. S., 602, where the court adheres to the principles announced in Schillinger's case, 155 U. S., 163. In the latter case concession was made by the appellant that the cause of action sounded in tort, and he contended that this court has jurisdiction under the Tucker Act over claims ex delicto founded upon the Constitution of the United States. He relied upon the Dooley case, but the court recognized that to carry out that contention would involve, by implicaion at least, the overruling of the Schillinger case, and said:

"We are not disposed to overrule the case, either directly or by implication."

It is to be observed that the statute forbids jurisdiction of "cases sounding in tort." The Supreme Court has held that in order to give the Court of Claims jurisdiction under the Tucker Act, the
63 the demands sued upon must be founded on "a convention between the parties"—a coming together of minds, and that there is excluded as not meeting this condition those contracts or obligations that the law is said to imply from a tort. Russell's case, 182 U. S., 516, 530; Harley's case, 198 U. S., 229, 234; Juragua Iron Co. case, 212 U. S., 297, 309. In this court a party may not waive a tort and sue in assumpsit. Bigby's case, 188 U. S., 400, 405, citing Cooper v. Cooper, 147 U. S., 370, 373.

I take the rule, therefore, to be that if the case made by plaintiff be one ex contractu at common law the court has jurisdiction, and if the case made by the plaintiff could only be maintained at common law by an action ex delicto, the court has not jurisdiction.

A test of whether the case is one of contract or tort under the form of declaration at common law has been said to be that "if specific breaches are assigned, sounding ex delicto, it is case on the tort." New Jersey Co. v. Merchants' Bank, 6 How., 344, 433. The latter seems to be the character of plaintiff's case, assuming that he has one.

The claim of damages in the petition is clearly the measure of damages which obtains in actions for deceit, and is not the measure of damages in actions for breach of contract. Smith v. Bolles, 132 U. S., 125, 129. In other words, the plaintiff claims all that he expended in and about the work, notwithstanding he agreed in the first instance to do the dredging at a fixed price, and thereafter, with full knowledge of the conditions, made a supplemental contract by which he voluntarily reduced the price fixed in the original contract, and as I understand the court's judgment, the plaintiff is awarded judgment for what he actually expended in the prosecution of the work. The "loss" thus ascertained is the measure of damages for deceit. And it is to be remembered that the plaintiff is compensated, not upon the theory of the value of his work to the defendant, nor upon the theory of what the reasonable cost would have been if he had had a plant reasonably adapted to the work. He concedes that he had a plant that was inefficient for the work as it actually developed, and he seeks judgment for what the work with that kind of a plant cost, and is awarded judgment accordingly.

The facts rebut the idea that what it cost the plaintiff to do the work is even measurably a basis for a judgment, because it appears that the work, at its most difficult stage, was completed by another contractor, who had, we may assume, a suitable plant with which to do the work, and the price paid for the completion of the work was about 4 cents more per cubic yard than plaintiff's original contract called for. Nor can the case made by the facts or alleged in the petition be said to be for a claim founded on contract, express or implied. It is true that the plaintiff may rely upon the contract as evidential, but what he seeks to recover for is a misrepresentation which preceded the contract. His action at common law would be

trespass on the case for misrepresentation, and such a case sounds in tort. National Bank & Loan Co. v. Petrie, 189 U. S., 423, 425; Smith v. Bolles, supra; Occidental Const. Co. v. United States, 245 Fed., 817.

At common law an action ex contractu can not be sustained by a case ex delicto or vice versa. The measure of damages in the cases is different, as frequently are material elements that go to make
64 up the case. Even in States where the common-law forms of action have been abolished, it is held that "the code does not authorize a recovery where the complaint alleges facts showing a cause of action in tort by proving on the trial a cause of action in contract." Wilson v. Haley Co., 153 U. S., 39, 47.

The Government having withheld jurisdiction from this court of cases sounding in tort, it would be an anomaly to hold that the plaintiff may recover in a case sounding in tort under the guise of a claim founded on contract. Occidental Constr. Co. case, 245 Fed., 817.

DOWNEY, Judge, concurs in this dissenting opinion.

65 V. *Judgment of the Court.*

At a Court of Claims held in the city of Washington on the third day of June, A. D., 1918, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the claimant, and do order, adjudge, and decree that the Atlantic Dredging Company, Walter B. Brooks, agent, as aforesaid, is entitled to recover and shall have and recover of and from the defendants, the United States, the sum of two hundred and eleven thousand and fifty dollars and nine cents ($211,050.09).

BY THE COURT.

VI. *Defendants' application for, and allowance of, appeal to the Supreme Court.*

From the judgment rendered in the above-entitled cause on the 3rd day of June, 1918, in favor of the claimant, the defendants, by their Attorney General, on the 2nd day of July, 1918, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed July 3, 1918.
Ordered: That the above appeal by allowed as prayed for.
July 5, 1918.

EDWARD K. CAMPBELL,
Chief Justice.

66 Court of Claims of the United States.

ATLANTIC DREDGING COMPANY,
W. B. BROOKS, AGENT,
vs.
THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court by Hay, J., and the dissenting opinion by Campbell, Ch. J., in which Downey, J., concurs; of the judgment of the court; of the defendants' application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this sixth day of July, A. D. 1918.

[SEAL.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

(Indorsed on cover:) File No. 26,767. Court of Claims. Term No. 681. The United States, Appellant, vs. Atlantic Dredging Company, W. B. Brooks, Agent. Filed September 24th, 1918. File No. 26,767.

INDEX.

CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,
v.
ATLANTIC DREDGING COMPANY, W. B. Brooks, agent. } No. 214.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the Government from a judgment of the Court of Claims allowing appellee, who had partly performed its contract and then repudiated it on the claim of misrepresentation, damages of $211,050.09 for its loss. The contract was entered into December 18, 1912, and called for certain dredging in the Delaware River below Philadelphia. The case can be best stated by setting forth the pertinent portions of the petition and the finding of facts.

THE PETITION.

The petition, in substance alleges that the claimant, who was engaged in the business of a general contractor, in response to an advertisement of the United States that it would receive bids for certain

dredging in the Delaware River, being desirous of bidding upon said work, applied to the contracting officer of the United States and was furnished with specifications, and that after examining the specifications it decided to and did bid for a certain portion of the work, namely, that designated in subdivision (3) of paragraph 16 of the specifications (R. 13) as the "lower end of Mifflin Range, connecting range, and upper end of Tinicum Range." That "claimant had no knowledge or information of its own at that time, except the general impression that the material in the channel of the Delaware River in that neighborhood was generally soft mud." (R. 2.) That it would have been impossible for claimant to have made any examination of the channel of the river where dredging was to be done in order to ascertain for itself the character of the material to be dredged, and that the Government knew this. That for information as to material to be dredged, claimant was referred to paragraph 27 of the specifications (R. 2, 16, 17), which is as follows: [Unless otherwise noted, italicization throughout this brief is ours.]

> 27. The material to be removed is *believed* to be *mainly* mud, or mud with an admixture of fine sand, except from Station 54 to Station 55+144 at the lower end of West Horseshoe Range, where the material is firm mud, sand and gravel or cobbles. (The section between Station 54 to 55+144 was not included in the area covered by the contract sued upon in this case.) *Bidders are expected to examine*

the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) *No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy.*

The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock or outcroppings of sufficient size to be classified.

Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include detached rocks or boulders capable of being raised in one piece. Should ledge rock be encountered, all overlying loose material shall be removed at the price bid for the general dredging.

That—

(10) Claimant understood from these specifications that the United States (hereinafter referred to as the 'Government') *did not intend to warrant* the material to be dredged to be 'mainly mud, or mud with an admixture of fine sand,' but claimant did understand that the Government *believed* that such was the character of the material; that it had informa-

tion in its possession sufficient, in its *opinion*, to justify such a *belief;* and that included in that information was the information furnished by the specimens of the material which had been obtained through test borings made by the Government in the usual way for the purpose of ascertaining in the most direct and certain manner the character of said material; and, knowing that the Government had been having dredging done in the channel of the Delaware River at this point for a long time prior to the date of said advertisement, and that it had had ample opportunities for and means of making itself acquainted with the real character of the channel, and that therefore, *if the Government believed* the material to be removed from the area in question to be mainly mud, or mud with an admixture of fine sand, *there was very little likelihood that the material was other than what the Government believed it to be, and little risk involved in assuming that the Government's belief was well founded*, made its bid for said work in reliance upon said representations of the Government with regard to the character of the material to be removed. (R. p. 3, paragraph 10.)

That it was provided in paragraph 28 of the specifications that the contractor should state in his proposal the character and capacity of the plant proposed to be used by him and that this was to be subject to the approval of the contracting officer. The claimant's bid was accepted and its plant was approved.

That (R. p. 4, paragraphs 17 and 18):

> (17) This plant was suitable for the dredging and placing on shore of ordinary mud, or mud with an admixture of fine sand, material which could be removed with comparatively little difficulty or expense.
>
> (18) It was not at all adapted to or suitable for dredging or putting on shore *compacted sand* or *gravel* or other hard and refractory substances.

That the work not proceeding as rapidly as was thought proper, claimant entered into a certain contract with another dredging contractor, which entered on the performance of work under the contract, the additional plant or equipment provided by said subcontractor for use on said work is specified. That (R. p. 4.)

> (22) With plant and equipment claimant could easily have completed all the dredging contemplated by said contract within seven months if the material to be removed had been "mainly mud, or mud with an admixture of fine sand," but said plant was not adapted to the dredging of such hard material as compacted sand and gravel, or other refractory material, except at very heavy cost to the contractor.

That (R. pp. 5–7):

> (24) *From the very beginning of the work the material encountered* by claimant was not mainly mud, or mud with an admixture of fine sand, but mainly material considerably

more difficult to remove, such as firm mud, hard sand, some cobbles, etc.

Nevertheless, the material encountered during the first month or two of the work was easy to dredge as compared with that which was encountered a very short time thereafter, *when claimant encountered, and has continued to encounter until the cessation of the work*, material vastly more difficult and expensive to dredge than mud, or mud with an admixture of fine sand, the same consisting mainly of a very hard, firm mud, together with compacted sand, gravel, cobbles, and clay, a very small percentage being soft mud, and claimant in fact says the material encountered throughout the area covered by said contract has not been mainly mud, or mud with an admixture of fine sand, but that more than seventy-five per cent of it has been of the kind above indicated, hard or compacted sand, gravel, very firm, and mud and cobbles.

(25) Owing to the fact that by far the greater part of the material to be excavated proved to be not soft mud, but vastly more difficult and refractory material, *it became extremely difficult, if not impossible (certainly not possible without providing a different plant,) for claimant to comply with that provision of the specifications which required all material dredged to be deposited in inclosed basins above high water, and in recognition of this fact* the contracting officer, Lieut. Col. George A. Zinn, on the 4th of May, 1915, entered into a supplemental agreement with claimant

copy of which is hereto attached, marked "Exhibit C," wherein it was recited that—

"It is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

"'*That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered;* that the deposit of said heavy material in inclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in inclosed basins above high water will not be injurious to navigation.'"

And thereupon it is stipulated in said supplemental agreement that the provisions of said original contract with claimant be modified "in the following particulars, *but in no others:*"

"(1) *That all material excavated and removed under the said contract, other than mud, or mud with an admixture of fine sand,* may be deposited in Delaware River at points above or below the Chester Island Dike or behind Tinicum Island, in the order named, and at locations indicated by the contracting officer.

"(2) *That in consideration of the change* in manner of disposal of said material, the unit price of twelve and ninety-nine one-hundredths cents ($0.1299) per cubic yard, scow measurement, as originally agreed upon, *shall be reduced* in the sum of two cents ($0.02), etc.

"(3) That nothing in this agreement shall be understood as affecting any of the provisions of paragraph six of said contract of December 18, 1912."

At the time of entering into this supplemental agreement, claimant, *while having discovered*, as already stated, *that the material to be excavated was entirely different from that which had been indicated in the specifications*, was not aware and had not discovered, and did not discover until shortly before the cessation of work on this contract, that at the time the Government invited bids for this work upon said specifications containing the statement that it believed the material to be removed was to be mainly mud, or mud with an admixture of fine sand, and that test borings had been made over the area to be excavated, the Government had not had any information as to the character of the said material which it deemed sufficient to entitle it to form and express such an opinion, *and particularly did not know that the Government's opinion was not based, as was indicated in the specifications, in any degree upon test borings made in the area to be dredged, and that in fact no test borings had been made.*

(26) As soon as claimant discovered the truth in this regard, he promptly made complaint to the contracting officer, and subsequently to the Secretary of War, and asked for redress.

(27) Claimant further, in fact, says that the maps and drawings in the contracting officer's office in Philadelphia, to which it was referred

in the specifications, purported to show the *result* of test borings made in the area covered by the contract, but claimant has ascertained, and now respectfully shows, that as a matter of fact *no borings whatever had ever been made by the Government in said area* at the time of the advertising for bids and the showing of said specifications to bidders, including claimant.

(28) Claimant further shows that as the result of work actually done, it is able to state, and does state, that if borings had been made, or even careful soundings, at the points in the channel at which said maps purport to show that borings were made, the Government must have known that the character of the bottom was not such as was shown by said supposed borings upon said maps, but that it was mainly compacted sand and gravel and other material of difficult and refractory character.

(29) Claimant is further informed, believes, and charges that the Government through its agents did make certain soundings in said channel, and that the persons making said soundings well knew that the material to be removed, as is disclosed by said soundings, was not "mainly mud, or mud with an admixture of fine sand," but that it was mainly of very much harder, refractory, and more difficult material.

(30) And claimant further, in fact, says that the said statement on the part of the Government in said specifications, that it believed the material to be removed to be "mainly mud, or mud with an admixture of

fine sand," was not true, in that it had no evidence before it which it considered adequate to furnish the basis of a belief as distinguished from a mere guess, and in that said belief was *not based in any degree upon test borings, no such borings having been made.*

(31) *And claimant further says that by reason of said misrepresentations contained in said specifications and upon said drawings it was misled into making a bid for the doing of said work which was very much lower than it would ever have made but for said misrepresentations* and making a contract for a price totally inadequate for the same.

(32) Claimant was also misled into providing itself with a plant and equipment for doing said dredging not suitable for dredging material of the character encountered, so that the time consumed by it in the doing of said work was necessarily much greater than it should have been, and the expense of doing said work vastly increased, so that claimant was compelled to expend a very large sum over and above the rates named in its bid and in said contract, which rates were based, as already stated, upon the material designated in the specifications and upon said maps.

(33) If the material to be dredged had been of the character indicated by the specifications, claimant could have completed the dredging on the estimated 1,340,000 cubic yards at an expense of $107,200. By reason of the fact that the material actually encountered was not the kind indicated in the

specifications, but of a kind vastly more difficult and expensive, as above set forth, the actual expense of dredging the same up to the time of the completion and cessation of the work under contract was__ $688,080.82

Or an excess of_____ 580,880.82

After crediting the amount actually received from the Government under the contract, viz____ 142,959.10

there is a balance left of_____ 437,921.72

for which claimant demands judgment in any event.

(34) But claimant further submits that by *means of the misrepresentations* contained in the specifications and maps regarding the character of the material to be dredged, it was caused to undertake and to do a kind of work which it would never have willingly undertaken, *and did not, in a legal sense, contract to do at all,* and is entitled to be paid the fair value of such work, which would be _____ $688,080.82

less cash received from the Government on account of the work_ 142,959.10

leaving a balance of_____ 545,121.72

for which amount claimant demands judgment.

THE SPECIFICATIONS.

In addition to provisions of the specifications set forth in the petition the following should be noted (R., p. 11, paragraph 7):

> 7. It is understood and agreed that the *quantities* given in these specifications are *approximate only,* and that no claim shall be

made against the United States on account of any excess or deficiency, absolute or relative, in the same. *No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.*

The stated amounts include dredging to a depth of 35 feet below the plane of mean low water, and additional cuts to equal side slopes of 1 on 5.

17. *Maps, data, etc.*—The precise locations of the above-mentioned areas are shown on maps marked "Delaware River, survey for 35-foot channel," which maps, showing the latest *soundings* taken over the areas, may be seen at this office, and should be examined by intending bidders before submitting proposals.

The mean rise and fall of tide in these areas is from 6 to 6.4 feet, and the velocity of the normal tidal current is at the rate of from 1½ to 3 miles per hour.

The usual working season is from March 1 to December 31.

18. *Work to be done.*—The depth of cutting under these specifications will vary from nothing to as much as 20 feet on West Horseshoe Range, 24 feet on Mifflin Range, 9 feet on connecting range, 21 feet on Tinicum Range, and 14 feet on Bellevue Range, figured to the grade depth of 35 feet. *The dredging will extend across the entire 800-foot width of the projected channel,* except over four isolated areas within the limits of the channel on Mifflin Range, and on connecting and the upper end of Tinicum Ranges, where the shoal runs

off into deep water. The lengths of channel to be dredged are as stated in paragraph 16. (R., p. 13.)

19. *Disposal of excavated material.*—The material excavated must be transported and deposited above high water, or in inclosed basins at places provided by the contractor and approved by the contracting officer.

In connection with the deposit of material above high water or in inclosed basins, the contractor must, without cost to the United States, construct and place weirs and sluices and operate them, and construct and maintain mud fences where directed, to the complete satisfaction of the contracting officer, so that there will be no appreciable loss of material. He must also construct and maintain in good condition all necessary banks and bulkheads without expense to the United States. He shall not deposit material upon private property without first obtaining written permission from the owners thereof. All dredging and preliminary work necessary to form dumping basins must be done without cost to the United States, and in a manner satisfactory to the contracting officer. Dredging basins must be dredged and maintained to such a depth and over such an area that the material dumped therein will not overflow their limits at any time.

Any material that is deposited elsewhere than in places designated and approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed. The

dumping ground must be plainly marked by conspicuous buoys, ranges, or stakes, and no dumping shall be done unless an inspector is present at the time, and the ranges, buoys, or stakes are clearly visible. (R., p. 14, specification 19.)

21. *Removal of logs, snags, etc.*—The work to be done will include the removal of all obstructions to navigation, including wreckage, lumber, logs, snags, stumps, piles, *boulders, or other material (except ledge rock) found within the limits of the work as it progresses,* all of which shall be deposited on shore above high water or disposed of in some other manner not detrimental to navigation, as may be approved by the contracting officer. (See also last subparagraph of paragraph 27.) (R., p. 15, specification 21.)

22. *Rate of progress.*—Work must be commenced and prosecuted as provided in paragraph 14. If at any time after the date fixed for beginning work it shall be found that operations are not being carried on at a rate sufficient, in the opinion of the contracting officer, to secure completion in the contract time, the contracting officer shall have the power, after 10 days' notice, in writing, to the contractor, to employ such additional plant or labor or to purchase such material as may be necessary to put the work in a proper state of advancement; and any excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This pro-

vision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into. The right is reserved to assume the capacity of the plant and force actually on the work as a measure of probable future progress. (R., p. 15, specification 22.)

37. *Claims and protests.—If the contractor considers any work required of him to be outside the requirements of the contract* or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within five days thereafter or be considered as having accepted the record or ruling. (R., pp. 19, 20, specification 37.)

THE CONTRACT.

The contract appears on pages 20 to 23 of the record.

Attention is called to the following provisions thereof (R. 21–23, paragraphs 2, 3, 7, and 8):

2. In conformity with the advertisement and specifications hereunto attached, and maps marked "Delaware River, survey for 35-foot channel," which forms a part of this contract, the said contractor shall furnish all the necessary plant and labor and *do the work of dredging in the Delaware River,* at lower end of Mifflin range, connecting range, upper end of Tinicum range, and widening the bends at

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ends of connecting range to a depth of 35 feet below the plane of mean low water, a *width of 800 feet in the straight parts, and a width of 1,000 feet in the bends.*

All material excavated and removed shall be deposited above high water or in inclosed basins, at places provided by the contractor and approved by the contracting officer.

It is understood and agreed that the said contractor shall at all times maintain upon the work a sufficient plant to insure the completion of the dredging within the contract time.

In consideration of the faithful performance and satisfactory completion of the above described work, the contracting officer will pay to the contractor the sum of 12 $\frac{99}{100}$ cents per cubic yard, scow measurement, *in full payments for all material excavated, removed, and disposed of in accordance with this agreement.*

3. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. *The decision of the contracting officer as to quality and quantity shall be final.*

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications *as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change*

or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

8. *No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished*, or alleged to have been performed, or furnished under or by virtue of this contract, *and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer*, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

In submitting its proposal for this contract which was accepted, the claimant stated (R. 28):

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof.

THE SUPPLEMENTAL CONTRACT.

The supplemental contract appears on pages 24 and 25 of the record, the reason for its making is expressly stated in it, and is (R. 24):

> That in the prosecution of the work under said contract heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered; *that the deposit of said heavy material in inclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work;* and that the deposit of said heavy material otherwise than in inclosed basins above high water will not be injurious to navigation.

It is apparent from this that the reason for the supplemental contract was not the difficulty in dredging the heavy material, but the time and expense incident to depositing the same as provided in the original contract, and that for the purpose of being relieved from this condition regarded by it as onerous, the claimant agreed to accept a reduction of two cents per cubic yard from its compensation as originally fixed.

It will be noted from the foregoing that the petition attempts to establish a cause of action for damages on account of misrepresentation inducing it to enter into a contract, and that the prayer is in the alternative, for the usual damages in an action for deceit, namely, its loss, or for what the work was reasonably worth.

FINDINGS.

Particular attention is invited to the findings in this case for the reason that they neither substantiate the essential allegations of the petition, nor is the opinion of the court responsive thereto, and, in addition, there is absolutely no finding as to the value or reasonable value of the work done by plaintiff.

The material findings will be here set out.

FINDING II.

In the year 1909, at a time when the project for deepening the channel of the Delaware River to 35 feet was before Congress, *the "test borings"* referred to in paragraph 27 of the specifications above mentioned *were made by defendants' agents.* They were made along the approximate center line of the proposed channel at 1,000-foot intervals, for the purpose of obtaining information on which to base an estimate of cost, and were made throughout a length of about 48 miles of the proposed channel. *These "test borings"* were made by forcing by hand pressure a long pole or spar with a hollow 1-inch iron pipe at the end into the river bed to grade, and the character of the material encountered was determined by the "feel" of the rod, and its location below mean low water was determined by measurements marked on the rod itself. These "test borings" were numbered consecutively, and in the area embraced by plaintiff's contract were numbered from 111 to 120, inclusive. A record was kept of the result at each of said borings or probings, and the material indi-

cated as being encountered by said method *was correctly entered upon field notes.* At several places in the entire area, and at two instances numbered 113 and 114 in the area included in plaintiff's contract, the probe struck hard, impenetrable material and would not go down under the method used. The fact was correctly recorded on the log or field notes at the time. A tracing or tracings were then made, upon which were correctly transcribed the data shown on the log or field notes, including the said information as to numbers 113 and 114 and other places where the probe had not penetrated. These tracings were forwarded to defendants' engineering office at Philadelphia.

Subsequently, and in about two months after said probings were made, the said agents who made them repaired to the places where the probe had not penetrated and made borings at those places by a method known as "wash borings," which consisted in inserting a cylinder in the soil below and applying a jet of water through a pipe, *which had the effect of bringing up the material below, and a correct record was made of the result of these "wash borings."* This record was also sent to the said engineering office. Thereafter, when the map exhibited with the specifications submitted to the bidder was made, *it showed the result of the said probings as reported by the parties who made them and shown upon said tracings, except at borings 113 and 114, where the map showed the result of the wash borings as reported.*

The map did not show the result of the probings at borings 113 and 114. The use of the probe and the use of the wash boring are each an approved method of ascertaining the character of soil or material in dredging operations. There is a third method, known as "core borings," which would accurately determine the precise material to be encountered, *but that method is not used to ascertain the character of material to be dredged.* It is frequently used where superstructures are to be placed. The *probing method* for ascertaining material to be dredged *is an approved method* and *is the method universally adopted by the Government and contractors on the Delaware River.*

The plaintiff, before executing the contract aforesaid, visited the office and examined the maps referred to in the specifications. Said maps contained a record of 26 borings, covering specified sections that were to be dredged, and of these 10 were in the section of the Delaware River which, by its contract afterwards made, the plaintiff agreed to dredge. Ten of said borings, according to the map of the defendants, indicated material as hereinafter shown. *The map did not indicate the method used in making the borings.* The map did not give the time when these borings were made, nor was it stated whether the borings were wash borings or core borings, or whether the boring was done by a probe. There was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were

made. The numbers of borings covering that section of the Delaware River embraced in the contract of the plaintiff were 111 to 120, inclusive.

On said map opposite Nos. 111 to 120, inclusive, under the heading "Material," were legends as follows: "No. 111, Frm. sdy. md.," meaning firm sandy mud. "No. 112, Frm. sdy. md. to 40.2, then hrd. gvl.," meaning firm sandy mud to 40.2 feet, then hard gravel. "No. 113, loose gvl. to 38.1, then fine compact gvl. to 39.3, then coarse loose gvl." "No. 114, loose gvl. to 35.5, then compact gvl." "No. 115, sft. md. to 40.7, then sdy. md.," meaning soft mud to 40.7 feet, then sandy mud. "No. 116, sft. md. to 39.8, then hrd. gvl.," meaning soft mud to 39.8, then hard gravel. "No. 117, sft. md. to 41.0, then frm. sdy. md.," meaning soft mud to 41 feet, then firm sandy mud. "No. 118, sft. md. to 41.2, then frm. sdy. md.," meaning soft mud to 41.2 feet, then firm sandy mud. "No. 119, sft. md. to 41.9, then frm. sdy. md.," meaning soft mud to 41.9 feet then firm sandy mud. "No. 120, sft. md. to 40.6, then hrd. sd.," meaning soft mud to 40.6 feet, then hard sand. *The plaintiff did not examine the site of the work for itself before making its bid,* and had no information *and made no inquiries as to the character of the material to be dredged* except that given by the defendants on the map above described.

There was time between the dates of the advertisement and the proposals for a proposed bidder to make an examination of the area and to make

probings in the manner in which the defendants had made them.

On November 8, 1912, plaintiff submitted a proposal to do said work at 12.99 cents per cubic yard by scow measurement, and its proposal, among other things, contained the following statement:

"*We make this proposal with a full knowledge of the kind, quantity, and quality of the work required,* and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof."

From this finding very important facts appear, namely:

1. The Government had actually made the test borings which the specifications stated it had made. The use of the probe and wash borings was the approved method of ascertaining the character of soil or material in dredging operations, and was the method universally adopted by the Government and contractors on the Delaware River. The method known as "core borings" was never used to ascertain the character of material to be dredged. The result of the borings was correctly transcribed and shown on the map which was exhibited to claimant. The fact that wash borings were taken at Nos. 113 and 114 while probe borings were taken at the other places was really to the benefit of prospective bidders. It appears that the wash borings were taken as an additional means to acquire information, and that

the result of the same was correctly shown. That the number of borings was ten in a space to be dredged which measured approximately 800 feet in width by 2 miles in length.

2. It is positively found that there was time between the date of the advertisement and of the proposals for a prospective bidder to make an examination of the area to be dredged and to make probings, and that claimant did not embrace the opportunity to examine the site or make probings. It is also found that claimant made a positive representation that it had full knowledge of the kind, quantity, and quality of the work required.

FINDING III.

The legends on said map do not contain a true description of the character of the material which was encountered by plaintiff in the prosecution of work. The material to be dredged at the other borings was different from that shown on the map exhibited to bidders.

The statements in the specifications and drawings concerning the character of the material to be dredged were based upon the said data obtained from the tracings made by the Government's agents as aforesaid, and said probings and borings were made in good faith by the agents of the United States and were believed by them to correctly represent the character of the material through which the probe penetrated, and at the points where the probe had not penetrated to correctly show the character of the material where the wash boring method was used.

This finding is important because the first part of it is the only finding which is at all responsive to the theory that the Government misrepresented anything. It finds that the legends on the map did not give a *true description of the character of the material which was encountered by claimant.* There is absolutely no finding that the Government, or anybody for it, represented that said legends gave a true description of the material which claimant would encounter, but it is found, as hereinbefore referred to in Finding II, that the legends on the map did give the correct result of the test borings; that they were true. This finding seems to have been on the supposition that there was some other express finding that the Government had positively represented that the legends on the map gave a true description not of the result of the test borings but of the *materials that claimant would encounter.* There is no such finding. On the contrary, Finding III, under consideration, expressly states that the test borings were made in good faith and were believed to represent correctly the character of the material through which the probe penetrated, and at the points where the probe had not penetrated to correctly show the character of the material where the wash borings were used, and it is found in Finding II that the results of these test borings were correctly shown.

FINDING IV.

> The plant which was brought on the work by the plaintiff was inspected and approved by the defendants, and was efficient for dredging the character of material which was mentioned in the specifications and described on the map, to which bidders were referred by defendants for information. But it was not efficient for dredging the material as it was actually found to exist. The plaintiff secured the services of another concern to do the dredging for it, and that concern did all the work that was done.

It appears from Finding II (R. 28) that claimant stated in its proposal that it had full knowledge of the kind, quantity, and quality of the work required, and thereupon produced its plant for doing the work, which was approved by the Government. The finding is that the plant was efficient for dredging "the character of material which was mentioned in the specifications and described on the map," but it does not find that the Government had represented that those were the materials to be dredged. On the contrary, it is found that the representation was only as to the result of the borings being correctly shown on the map, and the opinion was advanced that the information given thereby was fairly trustworthy. It may be claimed that by inference, when the Government approved claimant's plant, which claimant itself selected and produced, that the Government guaranteed that the plant would do the work; but

there is no such finding and nothing to warrant such an inference. It further appears from this finding that claimant actually did no work at all and that all of the work was done by another contractor.

This finding as to the plant brought to the work by claimant has no significance whatever. There is no finding that the Government either directly or by inference required any specific sort of plant, made any representation in regard thereto, or that the said plant was ever used.

FINDING V.

> After plaintiff, or the concern it had employed, had been at work for some time upon the said dredging, the plaintiff complained of the character of the material which was being encountered, and after some correspondence a supplemental contract was entered into on May 4, 1915, between the parties relative to the prosecution of the work, and a copy of the supplemental contract is filed with the petition herein, marked Exhibit "C," and is made a part of these findings by reference.

This finding must be taken in consideration with the supplemental contract and the petition. It appears (petition, R. 5) that claimant from the very beginning of the work had encountered "heavy and refractory material, consisting mainly of compacted sand and gravel with a small percentage of cobbles," and that after it had been at work for more than two years and was entirely familiar with the material it was dredging, it obtained from the Government a modification of its contract for this reason. It does

not appear that any complaint whatever was made by it as to the character of the material to be *dredged*, or that resort was had on this account to the method provided by the contract for any requirements outside of the terms of the contract (par. 37, R. 19, 20).

FINDING VI.

From Finding VI it appears that "On or about the month of December, 1915," although claimant was in possession of all facts in connection with the material to be dredged, and all facts incident to this contract, it then learned of the *manner* in which the probings had been made. There was no dispute that the probings had been made and that the result of the same was correctly communicated to claimant, and in addition for almost three years claimant had been working on the material which it claimed to have been misrepresented. On learning *how* the probings had been made, it thereupon discontinued work and rescinded the contract. In connection with this it is significant that no representation whatever had been made to the claimant as to how or in what manner the probings had been made, and it is expressly found by the court that they were made after the approved manner of making probings for information as to dredging in the Delaware River by "the method universally adopted" for that purpose. It is also found that at the time when the plaintiff disaffirmed its contract, it did not know that at points 113 and 114 the probe had reached an impenetrable material. It does not appear when it gained this information, but from the opinion of the court we take

it that it was not known until after this suit was filed. It is not disputed, however, and is expressly found by the court that the *result* of the probings made at these points was correctly shown on the map and exhibited to plaintiff. In fact, the court finds (Finding II, R. 28) that the legend was as follows: "No. 113, loose gvl. to 38.1, then fine compact gvl. to 39.3, then coarse loose gvl." "No 114, loose gvl. to 35.5, then compact gvl." That is the claimant complains because it was not told that the probe had struck impenetrable material, though it was shown the exact material which was struck and none of it was shown on the map to be "mainly mud, or mud with an admixture of fine sand." As is plainly found (Finding VI, R. 30), the material actually removed from the vicinity of points 113 and 114 was not as difficult to dredge or hard to remove as that shown by the map. It is found by the court that in the vicinity of boring 113 the material dredged shows a mixture of 24 per cent mud, 60 per cent sand, and 16 per cent gravel. In the vicinity of boring 114 the material showed a mixture of 50 per cent sand, 45 per cent gravel, and 5 per cent clay. The finding of facts is silent as to in what way either the specifications or the map could possibly have misled claimant as to these points, and its entire case seems to rest upon them. Finding VI further shows that at the time plaintiff stopped work there remained approximately 350,000 cubic yards of material to be dredged under its contract; that this work was completed under contract by another dredging company at the price of 16.2 cents per cubic yard. While the finding does not show that

claimant did no dredging in the vicinity of the two borings upon which it rests its case, i. e., Nos. 113 and 114, this finding does show that the dredging done by the contractor who assumed the work after appellee's default was in the vicinity of these stations.

FINDING VII.

Finding VII is that the claimant expended in the prosecution of the work $354,009.19; that it received from the United States the sum of $142,959.10, making claimant's *loss* on said contract the sum of $211,050.09. There are no specifications as to this finding; that is, of the different amounts that went to make the total expenditure of $354,009.19, and not even a finding as to the increased cost of encountering material which was not anticipated. In its petition claimant set forth that its total expenditures were $688,080.82 and its loss $437,921.72. While it does not appear from the findings, a calculation made from the total amounts set forth shows that the entire work under the contract would have cost the Government the sum of $189,000; that claimant was paid the sum of $143,000 and the Government paid an additional $56,000 to finish the work which claimant left uncompleted. The additional award of this judgment, to wit, the sum of $211,050.90, would make a total cost to the Government of over $400,000 instead of $189,000 as originally contemplated. That claimant in its petition asked judgment at the rate of 40 cents per cubic yard for work for which it agreed to take 12.99 cents per cubic yard, and that the judgment fixed the price at approxi-

mately 27 cents per cubic yard, though the Government was able to have the most difficult part of the work left uncompleted by claimant performed by another contractor at 16.2 cents per cubic yard, presumably at a profit to the contractor.

There is no finding whatever of the reasonable value of the work performed by claimant, and there is no data in the finding of facts upon which any inference as to this could be made, except that the Government, having been able to secure another contractor to complete the most difficult part of this work at a price of 16.2 cents per cubic yard, would indicate that in any event the reasonable price would have been less than that amount.

THE JUDGMENT OF THE COURT OF CLAIMS.

The case was decided by a divided court, the Chief Justice rendering an exhaustive dissenting opinion (R. 36–49) in which Judge Downey concurred. Many of the statements found in the opinion of the majority of the court have no basis in the findings of fact. The court seems to have adopted the theory that some representations, aside from the specifications and map, were made to claimant by some officers or agents of the United States. But, if any such representations were made, it is not shown what they were and there is no finding as to the same. The court apparently adopted the theory that misrepresentations of some kind were made and that, therefore, the claimant was justified in abandoning its contract, which had been partly performed, and suing for damages, and that the measure of damages would be its loss.

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ASSIGNMENT OF ERRORS.

It is submitted that the Court of Claims erred in the following particulars:

1. In holding, from the facts found, that there was any breach of duty on the part of the United States.

2. In misapplying the law to the facts as found.

3. In holding that under the facts as found it had jurisdiction to award judgment for claimant.

4. In misapplying the law as to the measure of damages.

BRIEF OF ARGUMENT.

I. There was no misrepresentation.

II. Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped.

III. By the finding of facts and the act defining its jurisdiction the Court of Claims, if it had jurisdiction at all, is precluded from applying the measure of damages it applied in this case.

I.

THERE WAS NO MISREPRESENTATION.

(a) THERE WAS NO MISREPRESENTATION IN FACT.

We have endeavored in the statement of the case to show that there was, as a matter of fact, no misrepresentation by the United States. The facts as found show that the probings were made in good faith, that the legends on the map exhibited to claimant show the exact result of these probings. It is complained that "the legends on the map do not contain a true description of the material which was en-

countered by plaintiff." (R. 3, Finding III.) It was never asserted by the United States that they did. It was shown on the map that there were ten borings in an area two miles or more in length by 800 to 1,000 feet in width, the area which claimant contracted to dredge; it was stated that the map showed the *results* of these borings, andit is conceded that it did. This is far, very far, from a statement that the legends on the map showed a "true description of the materials to be dredged;" but the specifications expressly stated (R. 39):

> A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. *No guaranty is given as to the correctness of these borings in representing the character of bottom over the entire vicinity in which they were taken*, although the general information given thereby is believed to be trustworthy.

To state the truth can hardly be called a misrepresentation; this representation is true in every detail, and is so found by the Court of Claims, namely—

(1) A number of test borings had been made.

(2) The result of the borings could be seen on the map by prospective bidders.

(3) The result of the borings was correctly shown on the map.

(4) The general information given by the result of the borings was believed to be trustworthy.

There is absolutely nothing false about it. Nothing is said as to the time when the borings were made. No inquiry was made by claimant as to this and there is nothing to show that subsequent borings would have given any other or better information. In addition, we submit that the legends on the map (R. 2–3) were substantially indicative of the material actually encountered in the dredging as shown by Finding IV (R. 5).

It was further stated in the specifications generally (R. 2):

> The material to be removed is *believed* to be mainly mud, or mud with an admixture of fine sand. * * * *Bidders are expected to examine the work, however, and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.*

This statement is also found to be true, and to have been made in good faith (R. 3, Finding III). In terms it is a statement of mere belief, and to avoid any possible misconstruction, the warning is given that it is in no sense a guarantee and that bidders must inspect and decide for themselves. This general statement is followed by the statement as to the maps and borings (last above referred to); and the warning is again given that there is no guarantee that the result of the borings correctly indicates the material to be dredged. There is *no* general or specific *guarantee* in the specifications or contract as to the materials to be dredged; there is *no*

general or specific positive *statement* as to these materials; all that is advanced is a *belief*, honestly formed and in good faith held (as found by the Court of Claims), and the facts on which this belief was founded, i. e., the results of the borings, were fully and correctly disclosed to claimant so that it could judge for itself. Claimant also was of the opinion that the results of the borings was trustworthy information; for they had been obtained by *"an approved method * * the method universally adopted by the Government and contractors on the Delaware River"* (Finding II, R. 28). Claimant was a dredging contractor (Petition, R. 1) and therefore, without examining the site, and without making inquiries (R. 3, Finding II), though it had ample time to make an examination for itself (perhaps because it had an impression of its own as to the material in the channel of the Delaware River) (Petition, R. 2), it decided to assume whatever "risk" there might be (Petition, R. 3) and submitted a proposal in which it solemnly asserted (R. 3)—

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required * * *.

Here is a direct, positive representation by claimant which should estop it from now asserting that it was not true. If it is misrepresentation to express an opinion, honestly formed from facts upon which any reasonable person might form such opinion, and when, in expressing it one states that it is only an opinion, that he does not guarantee its correctness,

and advises against reliance upon it without independent investigation and judgment, if it turns out that the opinion, while reasonably correct is not accurately so in every detail, then there might be a claim that some misrepresentation was made in this case. The impression remains, however, that misrepresentation in fact means an untruthful statement or act, and the record in this case will be searched in vain for an untruthful statement made directly or by implication on behalf of the United States.

Much is sought to be made of the fact that it was not disclosed to claimant when he examined the map that the results of the tests had been obtained by "probings." The manner of making different tests is fully set forth in Finding II (R. 27, 28), and it is shown by this finding that the method followed was the one "universally adopted by the Government and *contractors* on the Delaware River." The tests at another place in the specifications are spoken of as "soundings" (R. 13, par. 17). There is nothing to show that any inquiry was made by claimant, that there was any concealment practiced, any failure to disclose, and finally, absolutely no finding that it was in any way material or essential to claimant to be told that the results had been obtained by the method "universally adopted by the Government and contractors."

As to the claim that the Government did a reprehensible thing in not informing claimant that the probe had struck impenetrable material at stations

13 and 14, claimant did not learn of this until after this suit was filed (R. 33), and it therefore had no bearing whatever on the matter; but, as it is shown by the findings (R. 27, 28) that the map, instead of reciting that certain material had been encountered by the probe at these stations, *showed the actual material encountered.* It is rather difficult to understand the deception. Suppose the probe had struck rock, wouldn't the best information be that it had struck rock, instead of stating "impenetrable material?" What it struck at 113 and 114 was gravel, and this was shown on the map.

(*b*) **THERE WAS NO MISREPRESENTATION IN LAW.**

The claimant's case is founded upon the proposition that it was induced to enter into this contract by misrepresentations of such character that upon their discovery by it it was justified in rescinding the contract and suing for damages. There is no claim that by the action of the Government it was prevented from completing its contract. What is required to make out a case of this character is set out by Mr. Justice Lamar in *Southern Development Company* v. *Silva* (125 U. S. 247) at page 250, where is is stated:

> In order to establish a charge of this character the complainant must show by clear and decisive proof—
>
> *First.* That the defendant has made a representation in regard to a material *fact;*
>
> *Secondly.* That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage; and

Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an *expression of opinion or judgment, honestly entertained;* and, again (excepting in peculiar cases), it excludes statements by the owner and vendor of property in respect to its value.

The facts as found by the Court of Claims fail completely to establish (even by inference) any misrepresentation of this character by the Government and as before argued, fail to show any misrepresentation at all.

Claimant's case must, therefore, rest upon the theory that disregarding the form of its action, it can be said to rely on the proposition that the Government made a representation which amounted to a warranty or guaranty, as to the material to be removed; that claimant had a right to rely upon this representation, and having relied upon it, is entitled to be compensated for the loss occasioned in carrying out the contract, in so far as it carried it out. Disregarding for the present the rule that

the only recovery that could be had by it, if its theory is correct, would be the reasonable value of the work and would not be damages, it is submitted that the facts as found in no way substantiate its claim.

The misrepresentation which it must establish is that the Government misrepresented to it the *material on the bottom of the Delaware River covering an area of approximately 2 miles in length by from 800 to 1,000 feet in width.* If this misrepresentation was made at all, it could only have been made (1) by positive statement, or (2) by concealment of some material fact known to the Government and which it was its duty to disclose.

(1) It is too apparent for argument that the Government did not make any positive statement as to the character of the material to be dredged; it made no *positive* statements whatever as to the character of this material. The statements attributed to it are far from being as strong as statements which were held to be mere expressions of opinion in the case of *Southern Development Company* v. *Silva* (125 U. S., 247). That case was somewhat analogous to this in that the claim of misrepresentations were in regard to the bottom of an ore chamber in a mine, the bottom being covered with loose ore so that it could not be seen. The specifications which claimant relies upon positively state that the Government expressed only a belief formed from the results of certain test borings, and that it believed that these results

gave trustworthy information. This statement by its terms excludes any construction that there was a positive representation of the materials to be dredged. The only positive statement is that it believed the materials to be as indicated, and it is expressly found by the Court of Claims that this positive part of the statement was true; that the Government actually and in good faith held this belief, and the results of the probings justified it. In addition, claimant was admonished that this was only an expression of opinion on the part of the Government. It was shown the facts upon which this opinion was based and it was urged to make an independent investigation. It is expressly found that it did not make this investigation, though it had ample time to do so. Its petition, in fact, negatives its claim that any positive representation upon which it relied was made as to these materials. Paragraph 10 of the petition (R. 3, ante this brief, p. 3) states that its reliance was not upon a positive statement of the Government as to the materials, but was on the fact that if the Government believed the material to be removed to be mainly mud, etc., there was very little likelihood that there would be anything else and, therefore, that there would be "little risk involved in assuming that the Government's belief was well founded." Thereupon it made its bid without investigation. By its own statement it relied not on any positive representation by the Government, but relied on

a "belief" of the Government, knowing that it was only a "belief," and that there was a risk in placing reliance upon such an intangible thing; but, nevertheless, it assumed the risk. The admission that claimant knew it was assuming a risk when it relied upon a belief without investigation as to the true facts absolutely nullifies any claim of being damaged by a positive representation upon which it relied and had the right to rely. This really is an end of the matter. The fact that the borings were what is known as probe borings, and the fact that the probe at two places struck impenetrable material, if they have any relevancy at all, only go to the representation as to the material to be dredged, about which no representation was made. That any contention as to the manner in which the test borings were made is without merit is shown by Finding II (R., 28); that the probe method is an approved method and the one universally adopted by the contractors and the Government in the Delaware River; that no statement was made as to by what method the test borings had been made, and that the results were correctly carried in the legends on the map. Likewise, the fact that the probe struck impenetrable material at stations 113 and 114 is immaterial, because wash borings were subsequently used at these stations, and the results were correctly shown on the map which was exhibited to claimant. Moreover, this fact was not learned by claimant until after it had filed its suit.

There is no claim whatever that the correct result of the test borings at these stations were not shown to claimant.

(2) Nor was there any concealment of a material fact by the Government with reference to the test borings. The specifications stated that test borings had been made, and the results. In one place in the specifications the test borings are referred to as "soundings." That the use of the probe method is a test boring is shown by the finding of facts. The probe was driven, bored, into the material at the bottom of the river; it was the method exclusively used; the method known as core borings was never used in the Delaware River. It is not apparent why, when the specifications showed that test borings had been made and the probe boring method was the one universally used in this river, and no inquiry was made by claimant as to in what manner the test borings had been made, that there was any duty on the part of the Government to state that the probe method had been used. If some other method had been used, it might possibly be argued that a prospective bidder might have been misled on account of the fact that the probe method was the one universally used, and in the absence of some statement to the contrary he had the right to rely on the fact that it was used in this case. Nor was there any duty on the Government to recite in its specifications that the probe had struck impenetrable material at Stations 113 and 114. The specifications purported to show the materials actually encountered

in making the test borings, nothing more. There was no recital whatever as to how they were made, but the material encountered was truthfully shown in each instance; this information was not obtained in the first instance by the probe method, and therefore the wash method was resorted to and the result shown. Upon this theory the Government should have had the legends on the map simply show that in certain places the probe penetrated to a certain depth and in other places it did not penetrate at all; this would have shown nothing as to the character of the materials to be dredged, and it is difficult to conceive how anyone could possibly be misled by showing the actual result of the test borings, that is the materials encountered, because he was not advised as to how the borings were made. Attention is again called to the fact that the test borings, few as they were, were really quite indicative of the materials to be dredged.

This case is governed by Simpson v. United States (172 U. S. 372) and similiar cases.

Claimant relies on the cases of *United States* v. *Stage Company* (199 U. S. 414), *Hollerbach* v. *United States* (233 U. S. 165), *Christie* v. *United States* (237 U. S. 234), and *United States* v. *Spearin* (248 U. S. 132).

In each of the above cases a *positive* statement was made as to a material fact, which proved to be un true and caused a loss to the contractor which he would not have incurred except for the false statement.

In *United States* v. *Stage Company* it was positively stated that the number of stations to be served was two, when in fact it was four, which fact was known to the Government.

In *Hollerbach* v. *United States* a definite, positive statement, which was untrue, was made (p. 168), namely:

> The dam is now backed for about 50 feet with broken stone, sawdust, and sediment.

The facts were that it was backed with soft, slushy sediment and cribwork. A general paragraph of the specifications stated:

> It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work * * *.

Since the specifications contained this positive statement, Mr. Justice Day observed (p. 172):

> We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of the facts which the specifications furnished by the Government as a basis of the contract left in no doubt.

Certainly in the case at bar there is no positive statement guaranteeing the accuracy of the borings, but quite the reverse, and the paragraph calling attention to the borings also called attention to the refusal of the Government to guarantee them.

In the case of *Christie* v. *United States*—

> The material to be excavated, *as far as known*, is shown by borings, drawings of which

> may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material * * * (p. 239). (Italics by the court.)

The facts were that the materials were not shown by the borings, drawings of which were exhibited, *as far as known*, because in making the borings the engineers, when encountering logs or foreign materials, withdrew their boring apparatus without making any notation thereof and moved the apparatus aside so that it would not encounter these obstructions. Only the borings which did not encounter obstructions were recorded. Consequently the representation that the boring sheets showed material *as far as known*, was false, even though the Government was not chargeable with any sinister motive in not recording the omitted borings. The following quotation, however, from the opinion of the court in the Christie case, we think is peculiarly applicable to the case at bar:

> We do not think, therefore, that there is anything in the contract which cast upon the Government a prophecy and anticipation of abnormal conditions or which relieved claimants from the risks of their occurrence or of whatever they might encounter in the work. It is to be supposed that contemplation and judgment were exercised not only of certainties but of contingencies and allowance made for both at the time of bidding, with provision in the bid. Subsequent conditions could not lessen the obligation then incurred * * * (p. 245).

Furthermore in the Christie case it was found that the contractor did not have time to make an independent investigation, while in the case at bar it is expressly found that it did have time but did not make the investigation.

The Spearin case is so clearly distinct from the one at bar that it is unnecessary to consider it.

So far as analogy of cases goes, the case falls in the class illustrated by *Simpson* v. *United States* (172 U. S. 372). In the Simpson case borings were made and recorded on a profile drawing, which was consulted by the contractor before making his bid. The material shown on the profile and there indicated as stable and containing no quicksand (p. 373) turned out to be quicksand, and much additional expense above that anticipated was incurred by the contractor in building on that material. Yet in that case the court would not imply a warranty, Mr. Justice White saying (p. 381):

> The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States *without any express stipulation that there was a warranty* in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expression to that effect, or at least an unavoidable implication. This is made clearer by other portions of the contract and specifications.

In the opinion of the majority of the Court of Claims in this case the following sentence appears:

> The officer making the contract which we are considering was authorized to make it, and the plaintiff in its dealings with him had a right to rely on any representation made by him which related to the subject matter of the contract (R., p. 34).

There is no finding of fact that any representation was made to claimant by any officer of the Government. Even if any such statement had been made, appellant submits that the court's view of the law is incorrect, unless the so-called representation is *a part* of the written contract between the parties. The opinion of the Court of Claims indicates that the court construes the Christie case as authority for the proposition that the Government is liable for any representation of its officers or agents, whether embodied in the contract or not. In the Simpson case, *supra*, Mr. Justice White says (p. 379):

> Considering the facts above stated, it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation.

Unless the law has been changed to the effect that on all Government contracts the Government guarantees that the contractor will not suffer a loss in carrying out his contract, the case falls within that

class where this court has said the law is well settled, namely (*Spearin* v. *United States*, 248 U. S. 136):

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188 * * *; *Dermott* v. *Jones*, 2 Wall. 1.

II.

EVEN HAD THERE BEEN MISREPRESENTATION, CLAIMANT, BY ELECTING TO PROCEED WITH THE CONTRACT, RATIFIED IT AND IS ESTOPPED.

Claimant, after part performance, rescinded the contract and refused further performance, claiming its right so to do on the ground that the Government had represented the material to be dredged to be "*mainly* mud or mud with an admixture of fine sand," but that in fact "it was *mainly* of very much harder, refractory and more difficult material." (Petition, 29; R. 6–7.) Claimant began work on the contract early in February, 1913, and states (petition, R. 5):

> From the very beginning of the work the material encountered by claimant was not mainly mud, or mud with an admixture of fine sand, but mainly material considerably more difficult to remove, such as firm mud, hard sand, some cobbles, etc. Nevertheless, the material encountered during the first month or two of the work was easy to dredge as compared with that which was encountered a very short time thereafter.

Therefore claimant, having ascertained at the "very beginning of the work" the true character of the materials which it claimed had been misrepresented to it, did not rescind its contract or complain (as it should have done if the materials were not covered by the contract, specification No. 37 R. p. 19), but proceeded with the work for more than two years and then, in May 1915, knowing all there was to know about the material, entered into a supplemental contract in which the character of the material was correctly stated (R. 5) and this contract was entered into not because it had encountered material which it had not contracted to dredge, and not because any misrepresentation had been made to it, but, as recited in the contract, to relieve it from the requirements of the main contract as to deposit of dredged matter. By this supplemental contract it again agreed to do the work, but at a decreased compensation. Thereafter it continued with the dredging until December 5, 1915, when it "discontinued work under the contract and declined to do further work" (R. 30). And in this connection it is interesting to note that approximately half of the material dredged by claimant was dredged *after* the supplemental contract was entered into. It is sought by the petition to justify this course of action by the following allegation (R. 6, par. 3):

> At the time of entering into this supplemental agreement, claimant, while having discovered, as already stated, that the material

> to be excavated was entirely different from that which had been indicated in the specifications, was not aware and had not discovered, and did not discover until shortly before the cessation of work on this contract, that at the time the Government invited bids for this work upon said specifications containing the statement that it believed the material to be removed was to be mainly mud, or mud with an admixture of fine sand, and that test borings had been made over the area to be excavated, the Government had not had any information as to the character of the said material which it deemed sufficient to entitle it to form and express such an opinion, and particularly did not know that the Government's opinion was not based, as was indicated in the specifications, in any degree upon test borings made in the area to be dredged, and that in fact no test borings had been made.

The findings of fact not only negative this allegation, but positively find the contrary, namely, the Government did have information upon which to form a belief or opinion; that this belief was held and expressed in good faith, but simply as a belief, and it was based on "test borings" made by "an approved method * * * the method universally adopted by the Government and contractors on the Delaware River."

It is apparent that claimant knew it was bound by its contract, having relied on its own judgment and not on any positive representation of the Government, for, if the Government had made a positive representation (of the character illustrated by the

Hollerbach and Christie cases), claimant at "the very beginning" could have rescinded its contract. By its conduct it shows that it did not consider that there was any breach of duty on behalf of the Government that relieved it from the burdens it had assumed, and the excuse given, when it finally stopped work, by the findings of fact is shown to be no excuse. Even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the material to be dredged, and claimant knew all there was to know about this from the "very beginning." If there had been a misrepresentation as to materials which would have excused it, this was known as soon as work was begun and it should have acted then. By continuing it ratified the contract.

> While the party entitled to relief may either avoid the transaction or confirm it, he can not do both; if he adopts a part he adopts all; he must reject it entirely if he desires to obtain relief. Any material act done by him, with knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, will be a ratification. (Pomeroy's Equity Jurisprudence, v. 2, sec. 916, 4th ed.)

The same author states in section 917, page 1915 (4th ed.):

> The injured party must assert his remedial rights with diligence and without delay upon becoming aware of the fraud.

In *Shappirio* v. *Goldberg* (192 U. S. 232) it is stated in the opinion (p. 242):

> It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone and the party will be held bound by the contract. (*Grymes* v. *Sanders*, 93 U. S. 55; *McLean* v. *Clapp*, 141 U. S. 429.) In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, "announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him.

See also:

Wilson v. *Cattle Ranch Co.*, 73 Fed. 994.

Kingman v. *Stoddard*, 29 C. C. A., 413; 85 Fed. 740.

Richardson v. *Lowe;* 149 Fed. 625–628–631.

Ripley v. *Jackson, etc.*, 221 Fed. 209.

Gregg et al. v. *Megargel*, 254 Fed. 724–733.

Simon v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 579, 580, 581.

In the last cited case it is made clear that the time for the injured party to act is when he discovers a

false representation has been made; the manner in which it was made it is immaterial if it was a false representation. It is stated at page 581:

> But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered.

On page 580 it is stated:

> The fact that the defendant insisted upon performance, and that the plaintiff intended to perform, and then sue to recover the loss growing out of performance, can not alter the principle. The plaintiff was under no legal compulsion to go on. What he subsequently did was in execution of the contract. The deliberate execution of it was an adoption of it with knowledge of the deceit, and in contradiction of his purpose to sue for deceit practiced in its procurement.

Claimant having elected to continue the contract, knowing the nature of the materials to be dredged, has waived any right to assert a claim for damages on account of false representation. It elected to continue under the contract and therefore its only claim would be that it was compelled by the United States to perform work in addition to and not covered by the contract; it has made no showing of such case either in its petition or by the finding of

facts. The petition is entirely based upon misrepresentation inducing claimant to undertake a contract that it would not have undertaken but for such false representation. The issue is clear. There was or there was not false representation. If there was no false representation the case of course falls; if there was false representation, then claimant, by its actions in proceeding with the contract upon the discovery of that fact elected to be and is bound by the contract.

That there can be no question as to its election and that it is absolutely estopped is further shown by the subsequent contract made after the work had been in progress for more than two years. At that time, knowing all that was to be known about the character of the material to be dredged, and necessarily knowing of any misrepresentation, if any had been made, the claimant voluntarily entered into an additional or a supplemental formal contract in writing, the recitals in which show that it was made not because there had been any breach of duty on behalf of the Government, but for the express purpose of making the work which claimant had undertaken to do less difficult and less expensive to claimant. That in consideration of the advantage to it it agreed to accept a lesser compensation for the balance of the work. If there had been any misrepresentation in the inducement of the contract or any breach of duty whatever on the part of the Government up to that time, all was waived and claimant contracted

to complete the work under a contract satisfactory to it and of which it has not complained and as to which there is absolutely no claim of misrepresentation. Having done this claimant is bound. Even if misrepresentation existed in regard to the first contract, it could not disregard the second contract and rely upon some claim with reference to the first to relieve it from the obligation of the second. (*International Contracting Co.* v. *Lamont*, 155 U. S. 303, 309.) In that case the claim was that the second contract had been entered into under protest and yet relator was held bound by it. In fact the only way in which misrepresentation as to the first contract could be relied on would be to hold the second contract void. This is made clear by the court and it is stated (p. 309)—

> He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. (*Oregonian Railway* v. *Oregon Railway*, 10 Sawyer, 464.)

III.

BY THE FINDING OF FACTS AND THE ACT DEFINING ITS JURISDICTION, THE COURT OF CLAIMS, IF IT HAS JURISDICTION AT ALL, IS PRECLUDED FROM APPLYING THE MEASURE OF DAMAGES IT APPLIED IN THIS CASE.

Claimant's action, as shown by the petition, was for damages claimed to be due on account of having been induced to enter into a contract by false misrepresentations for the loss it claimed to have incurred. The Court of Claims finds (Finding VII, R. 31) that claimant actually expended in the prosecution of the work the sum of $354,009.19; it received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09. The judgment awarded was for this loss. The action was an action in deceit, and the judgment of the court shows that the damages awarded were the damages that are awarded by courts in such an action. For a claimant to maintain an action authorizing a judgment against the United States in the Court of Claims, its action must be founded on a contract express or implied. Claimant's action in this case and the judgment awarded by the court were both based, not upon the contract, but a tort. The petition alleges and the court necessarily holds by its judgment that the contract was absolutely void on account of fraud; therefore there was no contract and the action was for damages on account of the tort. The Court of Claims had no jurisdiction of this action and no authority to render a judgment on this ground.

Gibbons v. *United States*, 8 Wall. 269.
Morgan v. *United States*, 14 Wall. 531.

Schillinger v. *United States*, 155 U. S. 163.

Juragua Iron Co. v. *United States*, 212 U. S. 297.

Basso v. *United States*, 239 U. S. 602.

Ball Engineering Co. v. *White & Co.*, 250 U. S. 46.

In *Smith* v. *Bolles* (132 U. S. 125) it is stated (p. 129):

> The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representatives. * * * If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, * * * then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud.

This damage, as shown by this decision and many others, is the loss occasioned by a wrongful act. The Court of Claims has failed to distinguish this case, by its facts, from other cases where a claimant has been allowed to recover against the United States either because without any fault of his own, he was prevented from completing the contracts; or when, as in the Christie and other similar cases, extra work was required of the contractor for which the United States was responsible by warranty or otherwise. In these cases, while the judgment awarded is sometimes spoken of as damages, it is always for the amount to which the claimant is entitled in order to fairly compensate him for the work done, and can only be upon

the theory of *quantum meruit*. In *United States* v. *Behan* (110 U. S. 338) the claimant without fault of his own was prevented from carrying out his contract and the court states at page 345:

> When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he can not recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meriut*. There is no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.

The petition and finding of facts in the case at bar show clearly that claimant abandoned the work, that is, rescinded the contract, on the theory that a false representation had been made which entitled it to do so, and therefore it sued for its loss as damages. As shown by the last authority, this it could not do, even if it had been prevented by the United States, without its fault, from proceeding further with the contract, because it had rescinded it. What it did was to "elect to go for damages" on account of the tort, a false representation.

Where findings of fact are made upon which a judgment is predicated there must be some fact found to sustain each material element of the judgment. An important element of the judgment in

this case is the amount of the judgment. The finding of facts shows that the claimant in this case expended a certain amount and received a certain amount and that his loss (the amount of the judgment to which the court holds it entitled) is ascertained by deducting the amount claimant received from the amount which it spent. We submit that this is not enough. There is no finding that the amount it spent was necessarily required to do the work and no items whatever are set out to show how it was ascertained that it had spent $354,009.19. So far as is shown by the finding any portion of this amount might have been wasted; any portion might have been spent upon anything not essentially connected with the work. It may perhaps be said that taking the petition, the finding of facts, and the opinion of the majority of the court together, it may be inferred that the amount which the court finds claimant lost was expended by it on account of the claimed misrepresentation; but this should not be left to inference; it is an essential fact in the case necessary to be found and it certainly should be shown that the court found, as a matter of fact, that it had expended this amount, and all of it, in work necessarily connected with the performance of this contract and that the amount was properly chargeable against the United States on account of its misrepresentation. There could be no judgment in any amount, on this finding of facts on the ground of *quantum meruit*, for there is no showing at all as to what the dredging was reasonably worth, and the

finding of the court shows that it was not considering at all what the work was reasonably worth, but considered only claimant's loss. The loss, while it may be one of the facts to be considered in ascertaining the amount due under a claim for *quantum meruit*, is only one of the elements and is not determinative at all. If inference could be indulged in to supply an absolute omission of vital facts required to be found the only inference that arises is that the work in any event was reasonably worth far less than the amount claimant claims to have lost. The judgment of the court awards compensation at the rate of approximately 27 cents per cubic yard, for work which claimant contracted to do at 12.99 cents per cubic yard (and at a still less sum by the supplemental contract), the most difficult portion of which was actually completed by another contractor at approximately 16 cents per cubic yard.

CONCLUSION.

The record in this case affirmatively shows that claimant bound itself to perform certain work in the performance of which no unusual difficulties were encountered. It was for dredging a very large area of river bottom and the materials encountered were the materials ordinarily found in a river bottom, namely, mud, sand, and gravel, of different degrees of compactness. Plaintiff claims that it was led into this contract by a representation that the material to be dredged was *mainly* "mud, or mud with an admixture of fine sand," when it was

not *mainly* those materials. This representation was only an opinion or belief, and was honestly made, and was, therefore, no misrepresentation at all. The claimant had ample opportunity to investigate for itself, which opportunity it did not embrace. Its petition shows that it did not rely upon said representation absolutely as it must have done to recover, but knew that it was assuming a risk in doing so. It learned of the exact materials to be dredged as soon as it started to work; it continued work for over two years; it then entered into an additional contract for doing the work in regard to which no claim for misrepresentation was made; it still continued work under the contract and then abandoned the work; its only excuse for abandonment being, not that it did not know at that time the materials upon which it had been working for more than two years, but it then learned that the Government in making the tests upon which its opinion was based used a certain method; though it is shown that while the Government did not state that it had used any particular method in making the tests, that it had actually made the tests by the method exclusively used in the Delaware River.

Further, that claimant made a direct representation, upon which the Government had the right to rely, that it had full knowledge of the work required to be done; that the contract with claimant provided that it was to dredge all of the materials covered by the specifications at the price named in the contract,

except ledge rock; that the maps exhibited to it before it made its bid showed correctly that there were other materials to be dredged than "mud, and mud with an admixture of fine sand," and that the specification itself, to the effect that it was believed that the material was mainly as stated, of itself gave notice that there were other materials to be dredged which it, by its contract, contracted to dredge; that the facts absolutely failed to show any breach of duty on behalf of the United States which would authorize any recovery by claimant, and that the only default in this case is on its part. Further, that the finding of facts show that the majority of the Court of Claims entirely misconstrued the effect of the facts as found and misapplied the law upon the case as made. It is therefore asked that the judgment of the Court of Claims be reversed and the case remanded with directions to dismiss the petition.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

JANUARY, 1920.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 214.

UNITED STATES OF AMERICA,
Appellant,

vs.

ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

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TABLE OF CASES.

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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

STATEMENT OF CASE.

This suit was instituted in the Court of Claims by the appellee, the Atlantic Dredging Company, against the United States to recover for losses sustained by it by reason of the breach on the part of the Government of a contract between the Government and the appellee (claimant below) for the dredging of a 35-foot channel in the Delaware River, below Philadelphia.

The claimant, in its petition, did not undertake to set forth its case with the technical formality of a declaration at common law, but did set forth a plain statement of the facts, without technical formality, and prayed for relief in a general manner, together with a detailed statement of its claims on alternative theories. (Paragraph 33 of Petition, Record, p. 7.)

In this paragraph of the Petition (Par. 33), plaintiff, in effect, makes claim for the damages sustained by it as the result of the misrepresentations made in the specifications—that is to say, the breach of the warranty as to the character of the material which the Government had encountered in the river bottom in making its test borings. The theory as to the measure of damages presented in this paragraph of the Petition may or may not be erroneous, but, in any event, the judgment actually given by the Court of Claims was safely within the rule of damages in such cases, because the judgment is for no more than the amount actually expended by the plaintiff under the contract, less the amount received from the Government, that being the measure of damages for breach of such contracts approved by this Court in the cases hereinafter cited.

In any event, no question as to the pleadings, or of any variance between the case as presented in the pleadings and that established by the evidence having been raised in the Court below by demurrer, exceptions to the evidence or otherwise, we must assume that this Court will consider the case "as presented by the facts" (found by the Court of Claims), just as that Court did, as indicated in the dissenting opinion of Chief Justice Campbell and Mr. Justice Downey, where they say: "It is not unusual for the Court to require the plaintiff to make more specific his petition. All of the Judges are agreed that it is within the power of the Court to require the plaintiff's case to be stated in the petition. In the instant case, which was not called to the Court's attention until

after all the proof was taken and it was submitted upon the petition and proofs, we must consider it as presented and determine *what is the case made by the facts.*" (Record, p. 42, italics ours.)

The case, as shown by the findings of fact of the Court below, taken in connection with the Petition and exhibits therein referred to, is substantially this:

On the 8th of October, 1912, the United States Government advertised for: "Sealed proposals for dredging in the Delaware River below Philadelphia * * * information on application." Bidders were invited to base their bids upon the specifications which had been prepared by and were submitted by the Government.

These specifications (Record, pp. 10-20) stated that the depth of the channel to be dredged was 35 feet, and under the heading, "Quality or Character of the Material," contained the following statements:

1. (Record, p. 16) "The material to be removed is believed to be mainly mud or mud with a mixture of fine sand, except from Stations 54 to 55 and 144, at the lower end of West Horseshoe Range (the latter not being included in this contract) where the material is firm sand and gravel, or cobbles"; and

2. "A number of test borings have been made in all of the area where dredging is to be done under these specifications, and the *results thereof may be seen by intending bidders on the maps on file in this office*" (Engineer's Office in Philadelphia).

Now, of course, this latter statement did not mean or amount to a guarantee that all of the material which the contractor might encounter in dredging in the area covered by this contract would necessarily be the same as that which the

Government had encountered in making the test borings (and this is specifically stated in the following paragraphs of the specifications), but it did mean that the maps to which the bidders were referred contained a truthful statement of the material which had been actually encountered by the Government in making the test borings, and a true record of the results of *all* the test borings which it had made.

These statements or representations were material, going to the very root of the contract, for the reason that the claimant had no knowledge of any facts upon which to base a judgment as to the probable character of the material to be dredged and the probable cost thereof, except the information contained in these specifications, and the maps therein referred to, and, as stated in the findings of fact (Record, p. 28): "made no inquiries as to the character of the material to be dredged except that given by the defendant on the maps above described." These representations, therefore, amounted to a warranty or condition.

The Court of Claims finds that these statements were untrue.

The maps to which bidders were referred and which the claimant examined before making its bid, and upon which its bid was based, did *not* show the results of all the borings which the Government had made. They showed the results of ten of those borings only, and that in six of them the material encountered had been "soft mud," in two of them "loose gravel," and in the other two "firm, sandy mud"; all indicating a comparatively easy job for the contractor; whereas two other borings had been made or attempted to be made by the Government, in which it had encountered material so difficult as to be impenetrable by the probe used in making the borings and recorded on the *field notes* at the time as "compacted sand and gravel, impenetrable," *but this record was never transferred to the maps shown to the bidders.*

To quote from the findings of fact (Record, p. 27):

"These 'test borings' were numbered consecutively, and, in the area embraced by the plaintiff's contract, were numbered from 111 to 120, inclusive. The record was kept of the result at each of said borings or probings, and the material indicated as being encountered by said method was correctly entered upon *field notes*. At several places in the entire area, and in two instances, numbered 113 and 114, in the area included in plaintiff's contract, the probe struck an impenetrable material and did not go down under the method used. The fact was correctly included in the *log or field notes* at the time. A tracing or tracings were then made upon which were correctly transcribed the data shown on the log or field notes, including the said information as to numbers 113 and 114, and other places where the probe had not penetrated. These tracings were forwarded to defendant's engineering office in Philadelphia. Subsequently, and in about *two months* after said *probings* were made, the said agents who made them repaired to the places where the probings had not penetrated, and made borings at those places by a method known as 'wash borings,' which consisted of inserting a cylinder in the soil below and applying a jet of water through a pipe, which would have the effect of bringing up the material below, and a correct record was made of the results of *these 'wash borings.'*" (N. B.—The material recorded as having been encountered in making these wash borings at Nos. 113 and 114 was described as "loose gravel"—made loose by the pressure of the "jet of water through a pipe.") "This record was also sent to the said engineering office. Thereafter, when the map exhibited with the specifications submitted to the bidders was made, it showed the result of said *probings*, as reported by the parties who made them and shown upon said tracings, *except at borings* 113 *and* 114, where the map showed the result of the 'wash borings,' as reported. The map *did not* show the result of the *probings* at borings 113 and 114."

Of course, if the map had shown the result of the probings which had been made, or attempted, at borings 113 and 114, it would have shown exactly what the field notes showed, to wit, that the Government's engineers had encountered at these points "compacted sand and gravel, impenetrable."

To quote again from the findings of fact (Record, p. 28):

> "The plaintiff, before executing the contract aforesaid, visited the office and examined the maps referred to in the specifications" (*ibid.*), and
>
> "There was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made."
>
> "The numbers of the borings covering that section of the Delaware River embraced in the contract of the plaintiff's were 111 to 120, inc.," and the record of the material encountered is as follows, as shown on the map:
>
> "111—Firm, sandy mud.
> "112—Firm, sandy mud.
> "113—Loose gravel.
> "114—Loose gravel.
> "115—Soft mud.
> "116—Soft mud.
> "117—Soft mud.
> "118—Soft mud.
> "119—Soft mud.
> "120—Soft mud." (Record, p. 28.)

All of the above showed the result of the probe down to below 35 feet, the depth of the channel which was to be dredged. Below this level, these borings indicated, in many cases, more difficult material, such as "hard gravel," etc., but, of course, we are not concerned in this case with the character of the material below the level to be dredged under the contract.

The findings then goes on to say:

> "The plaintiff did not examine the site of the work for itself before making its bid, and had no information and made no inquiries as to the character of the material to be dredged except that given by the defendant on the map above described." (Rec. p. 28.)

After which the Court says:

> "The legends on said map do not contain a true description of the material which was encountered by the plaintiff in the prosecution of the work." (Record, p. 29.)

And on page No. 30 the character of the material actually found at each of the borings in the neighborhood of which work was done by the claimant under the contract is set forth in detail; the dredging showing, in many cases, a large percentage of "sand and gravel," and this material encountered in the course of the doing of the work is described by the Government's engineer, in the Supplemental Agreement of the 4th of May, 1915 (Record, p. 24, Exhibit C), as:

> "Heavy and refractory material consisting mainly of compacted sand and gravel, with a small percentage of cobbles."

The actual contract which was based upon the specifications, and of which the specifications are made a part (Record, p. 20, Exhibit B), required the contractor to provide a plant suitable for doing the work—the dredging called for under the contract—which was to be approved by the Government's engineer.

> "The plant which was brought on the work by the plaintiff was inspected and approved by the defendant, and was efficient for dredging the character of the material which was mentioned in the specifications and described on the map to which the bidder was referred by the defendant for information. But was not efficient for dredging a material as was actually found." (Findings of Fact, Record, p. 29.)

It is evident, therefore, that the Government's own engineer was as much misled by the failure of the map to disclose the fact that heavy and refractory material, consisting mainly of "compacted sand and gravel, impenetrable," had

been encountered in making the test borings as was the contractor, else he would not have approved of such a plant, and it may be fairly inferred that the additional time required for the doing of the work, because of having a plant unsuitable for dredging such difficult material greatly increased the cost to the contractor and caused it to discontinue the work as soon as it found that it had a legal right to do so, instead of finishing the work and suing for the increased cost, as was done in the case of Christie vs. United States, hereafter referred to.

It further appears from the finding of facts (Record, p. 29) that:

> "After plaintiff or the concern it had employed had been at work for some time upon the said dredging, the plaintiff complained of the character of the material which was being encountered and, after some correspondence, a supplemental contract was entered into on May 4th, 1915, between the parties, relative to the prosecution of the work, and a copy of the supplemental contract is filed with the Petition herein, marked Exhibit C, and is made a part of the findings by reference."

In this Supplementary Agreement, which was approved by General Kingman, Chief of Engineers of the United States Army, it was stated:

> "It is found advantageous and to the best interest of the United States to modify the said contract (the original contract) as hereafter specified, for the following reasons:
>
> "That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compact sand and gravel, with a small percentage of cobbles, has been encountered; that the deposit of the said heavy material in enclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in enclosed basins above high water will not be injurious to navigation.

> "Now, therefore, the said contract is by this Supplemental Agreement between Col. George A. Zinn, Corps of Engineers, United States Army, and the said contractor, on the 4th day of May, 1915, hereby modified in the following particulars, *but in no others.*"

And it then goes on to provide that:

> "All material excavated and removed under the sand contract, other than mud or mud with a mixture of fine sand, may be deposited in the Delaware River"

at certain points, instead of being deposited in enclosed basins above high water, in consideration of an abatement of two cents per cubic yard from the original contract price.

It is true, of course, as stated in the Government's brief, and so much urged in the dissenting opinion in the Court of Claims, that at the time of entering into this supplemental contract, the claimant was fully aware of the fact that the material which it was encountering in doing the dredging was very much more difficult than it had been led to expect that it would be from the representations made to it in the specifications and maps with reference to the material which had been encountered by the Government in making the test borings, and the idea pervading the dissenting opinion, as well as the Government's brief, on this point seems to be that, because the claimant did not discontinue the work upon making *this* discovery, but entered into a supplemental agreement, which reaffirmed the contract except in so far as it was modified thereby, it waived all right to claim compensation because of any misrepresentations contained in the specifications and maps.

But we submit that this is a totally erroneous view. For, as we have already seen from the quotations from the specifications (Sec. 27 thereof, Record, p. 16), the Government had not undertaken to make any statement as to what the material to be dredged over this area was. On the contrary, it had said: "No guarantee is given as to the correctness of these borings as representing the character of the bottom over

the *entire vicinity* in which they were taken, although the general information given thereby is believed to be trustworthy" (Record, p. 17), and therefore, even though all the material encountered by the claimant had proven to be "compacted sand and gravel, impenetrable," or even rock, the discovery of that fact would not have entitled it to abandon the work.

It took the risk that the material in other parts, or in all the other parts, of the bottom to be dredged would turn out to be different from the material encountered by the Government at the points at which it had made its test borings recorded on the map, and when it found that the judgment it had formed as to the character of the material which it would probably encounter, based upon the results of the test borings recorded on the map, was mistaken, it stuck to the work in most praiseworthy fashion, and continued its effort to complete the dredging, notwithstanding the heavy losses which it was sustaining in so doing.

But the Court below finds specifically: "At the time of making such supplemental agreement plaintiff was not aware of the manner in which the test borings over the area embraced in its contract had been made," and also that: "At the *time plaintiff had not been informed of the fact that impenetrable material had been reached by the probe, as aforesaid*" (Record, p. 30).

In other words, the plaintiff did not know at that time of facts which would have justified it at that time, or sooner, in abandoning the work, and the existence of which facts justified it in abandoning the work later on.

The findings of fact state that: "In or about the month of December, 1915, the plaintiff learned that the borings had been made by the probing method above mentioned. The plaintiff thereupon discontinued working under the contract, and declined to do further work"; claiming, in effect, that the nature of the information which the Government had based its estimate, and authorized the claimant to base its

estimate of the probable character of material to be dredged, had been misrepresented.

It further appears from the findings that: "At the time the plaintiff ceased work there remained approximately 350,000 cubic yards of material to be dredged in the area covered by the contract and that thereafter the work was completed under a contract with the American Dredging Company, whose bid for doing the same was 16 2/10c. per cubic yard," about 3 3/10c. per cubic yard above the price at which the plaintiff had contracted to do it.

The findings of fact conclude as follows:

> "7. B (ii). The plaintiff actually expended in the prosecution of the work the sum of $354,009.19. It received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09." (Record, p. 31.)

> "*Conclusion of Law.*
>
> "The Court, upon the foregoing findings of fact, decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $211,050.09. It is, therefore, adjudged and ordered that the plaintiff recover of and from the United States the sum of $211,050.09."
>
> (Record, p. 31.)

THE LAW OF THE CASE.

It is respectfully submitted that the conclusion thus reached by the Court of Claims, upon the facts found, was correct, and should be affirmed.

As already stated, this suit is in effect an action for the breach by the defendants of the contract between them and the claimant, or, to state it more specifically, of the warranty or condition contained in said contract, consisting of the representations made by the defendants in their specifications, which constituted a part of the contract, with respect to the information which it had received, as shown by the

maps, to which bidders were referred, in regard to the probable character of the material to be dredged, and also as to the grounds upon which it based its "belief" that the said material would be found to be "mainly mud or mud with a mixture of fine sand."

Conceiving that pleadings of technical formality were not requisite or customary in the Court of Claims, the claimant contented itself with a plain statement in its petition of the facts upon which its claim was based, so far as known to it at the time of instituting the suit, without technical formality—a course of procedure which, it is submitted, is sustained by this Court in the case of *United States vs. Behan*, 110 U. S. 347, where it is said:

> "The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damages sustained by him. Though it is true that he does pray judgment for damages arising from loss of profits, yet he also prays judgment for the amount of his outlay and expenses less the amount realized from the sale of materials on hand. The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the Court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

Now, as already stated, the appellee's claim, as exhibited by the facts set forth in the Petition, was and is that the Government, as part of its contract with the appellee, made representations amounting to a warranty or condition to the effect: that it believed from the information which it

had received, as the result of the test borings which it had made, that the material to be dredged in the area covered by this contract was "mainly mud or mud with a mixture of fine sand," and that the appellee, before making its bid, could ascertain for itself the facts upon which this belief upon the part of the Government was based, by looking at the results of test borings appearing upon the maps, and that those maps contained a true record of the results of all the borings which the Government had made in this area.

Now, the Court of Claims finds, as already shown, that this representation was untrue, in that the maps did not show the results of all the test borings which had been made, and that, on the contrary, two borings had been made, the results of which did not appear upon the maps, and the results of which, if they had been recorded upon the maps shown to the bidders, would have disclosed the fact that material had been encountered by the Government in making its test borings in this area of a far more difficult character than that shown to have been found in the ten borings which had been recorded, *and would have disclosed the presence of the kind of material which was actually encountered later, when the work was being done under the contract.*

The Court below having found as a fact the making of this representation, and the further fact that it was not true, it is submitted that a state of facts is thus exhibited which clearly entitled the appellee to recover, as for a breach of warranty or condition, under the law, as settled by the decisions of this Court.

The decisions of this Court which would seem to cover the case at bar are as follows:

United States vs. Spearin, 248 U. S. 132;
Anvil Mining Co. vs. Humble, 153 U. S. 540;
United States vs. Utah, etc., Stage Co., 199 U. S. 414;
Hollerback vs. United States, 233 U. S. 165;
Christie vs. United States, 237 U. S. 234.

The fact of misrepresentation in the case at bar was discovered in this case after a great deal of the work under the contract had been done by the appellee, and after large amounts of money had been expended by it in doing this work, but before the actual completion of all that the contract called for, the appellee having stopped further work immediately upon discovery that a misrepresentation had been made.

The appellee contends that it was justified in refusing to go on with the work when it discovered that the Government had failed to disclose upon the map to which bidders were referred two borings which had been made by it within that portion of the river covered by the contract in question, when it was definitely and specifically representing that the map showed the result of the borings which had been made by the Government; that *from the inception of the contract* it was a condition of it, that any statement or representation in relation to anything done for the purpose of ascertaining the character of the material to be dredged was in its very nature a material and essential statement or representation, and that its falsity, whether resulting from design or accident, gave the appellee the right to stop work and sue as for the breach of the contract.

In the case of *United States vs. Spearin*, 248 U. S. 132, Spearin entered into a contract with the Government for the erection of a drydock upon a designated site. The contract called for the relocation and reconstruction of a 6-foot brick sewer which intersected the site where the drydock was to be located. This relocated sewer was to be built in accordance with plans and specifications furnished by the Government, which Spearin accordingly followed, and the work was approved by the Government. Later during the progress of the work of excavating for the drydock there occurred a sudden and heavy downpour of rain coincident with a high tide, which forced the water up the sewer for a considerable dis-

tance, causing internal pressure, which broke the reconstructed sewer at several places and flooded the excavation of the drydock. Investigation disclosed that the flooding was caused by a dam in another sewer called the 7-foot sewer, into which the new sewer built by Spearin emptied. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue prints which were submitted to Spearin. *On them the 7-foot sewer appeared as unobstructed.* The Government officials concerned with the letting of the contract and construction of the drydock did not know of the existence of the dam. The site selected for the drydock was low ground, and during some years prior to making the contract sued on the sewers had from time to time overflowed to the knowledge of these officials and others. But the fact had not been communicated to Spearin by anyone. He had before entering into the contract made a superficial examination of the premises and sought from the civil engineer's office at the Navy Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers, nor special inquiry into the possibility of the work being flooded, and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work, and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger, or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. It was unsafe to both Spearin's and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested

with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site (pp. 133-135).

Upon these facts, Spearin was held by this Court to be entitled to recover so much of his proper expenditures upon the work plus $60,000, representing the profit he would have made had he completed the work.

The ground for this decision is thus stated in the opinion:

> "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day vs. United States*, 245 U. S. 159; *Phœnix Bridge Co. vs. United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site assumes ordinarily the risk of subsidence of the soil. *Simpson vs. United States*, 172 U. S. 372; *Dermott vs. Jones*, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co. vs. The Mayor*, 160 N. Y. 72; *Filbert vs. Philadelphia*, 181 Pa. St. 530; *Bentley vs. State*, 73 Wisconsin, 416. See *Sundstrom vs. New York*, 213 N. Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie vs. United States*, 237 U. S. 234; *Hollerback vs. United States*, 233 U. S. 165, and *United States vs. Utah, etc., Stage Co.*, 199 U. S. 414, 424, where it was held that the contractor should be relieved if he was misled by erroneous statements in the specifications.
>
> "In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the Government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the drydock proper. It was as necessary as any

other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the Government that the present case is to be distinguished from the *Bentley Case, supra,* and other similar cases, on the ground that the contract with reference to the sewer is purely collateral, is clearly without merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the drydock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract."

It will be observed that this Court in the *Spearin Case* held that the representation that the plans and specifications were sufficient if complied with to accomplish the thing which the contract contemplated, constituted a warranty, and that Spearin had a right to enter into the contract in reliance upon the represented sufficiency of the plans and specifications prescribed by the Government to accomplish the results mentioned in the contract. And it was further held that when this warranty of sufficiency had been broken by the Government, that Spearin had a right to discontinue the work under the contract and sue for its breach.

It is to be observed that the estimated cost of restoring the sewer in that case was but $3,875.00—a very small item proportionally in a transaction involving $757,800.00. Indeed, the Government contended that "the contract with reference to the sewer is purely collateral."

But this Court held that:

> "The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the drydock proper" (p. 136).

The right to stop work without forfeiting all right to recover for the breach of warranty was recognized expressly by this Court in the *Spearin Case*. There the Government was properly asked to assume the damage which had resulted by the breach of warranty, and upon its refusal to do so the contractor was relieved from further obligation to proceed with the work.

Upon this point the Court said:

> "The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume work. He was not obliged to restore the sewer and to proceed at his peril, with the construction of the drydock. When the Government refused to assume the responsibility, he might have terminated the contract himself. *Anvil Mining Co. vs. Humble*, 153 U. S. 540, 551-552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

It is not necessary to review in detail the *Christie, Hollerbach and Utah, etc., Stage Co. cases, supra*. Each of these cases is clear upon the point that where a material representation is made in the contract, or in the specifications which are a part of the contract, and such a representation turns out to be untrue, the injured party has a right to recover the damages resulting from such misrepresentation. The *Chris-*

tie Case and the *Hollerbach Case* both involved representations as to the character of the work to be done, and clearly establish that such representations are material. The point which those cases did not decide, which is involved here, is what are the rights of the contractor in such a case with respect to *stopping work*. In both those cases and in the *Utah Stage Co. Case*, the contractor completed his work under the contract, and claimed an additional amount for damages arising out of the misrepresentations.

It, therefore, becomes important in the case at bar, to show what are the rights of the contractor where he stops work by reason of a material misrepresentation. The *Spearin Case* has been discussed at such length because it is controlling upon this proposition. It makes clear that in the case of a breach of warranty or condition, which relates to the character of the work to be done, that such a breach goes to the root of the contract, and justifies the contractor in stopping work. It further holds that in such an event the contractor does not lose his rights under the contract, but may sue for its breach and recover the amount of his outlay, plus such profit as he would have made had he completed the work.

In the *Spearin Case*, there is cited the case of *Anvil Mining Co. vs. Humble*, 153 U. S. 540, which is particularly important in view of some confusion which has arisen by the use of certain language in the case of *United States vs. Behan*, 110 U. S. at page 345, as follows:

> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for the breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services * * * ."

It will be noted that the Court says that, "when a party *injured* by the *stoppage* of a contract elects to rescind it," then his recovery is upon the *quantum meruit*. The exact situation which the Court had in view when this language was used is not entirely clear, but evidently the Court had in contemplation a case of *a technical rescission of the contract*. The authorities are clear that a mere stoppage of the work or an abandonment of a contract, when this is *justified* by some breach of the contract by the other party, does not work a rescission of the contract in the sense that no right of action can be asserted thereunder by the party who was compelled by the act of the other party to abandon the fulfillment of the contract. To permit this would in effect allow one party by his own wrongdoing to at any time put an end to a contract.

The case of *Anvil Mining Co. vs. Humble*, 153 U. S. 540, lays down the correct rule upon this question, to the effect that where one party abandons work under a contract *as a result of a breach of the same by the other party*, the right of the innocent party to sue under the contract for its breach remains unimpaired.

The Court in that case, in passing upon an instruction granted by the lower Court, said (pp. 551-552):

> "It is insisted and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. *Such an abandonment is not technically a rescission of the contract*, but is merely an acceptance of the situation which the

wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burden and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused." (Italics ours.)

Now, in the case at bar, it is submitted that upon the same principle, when it is found that at the time when the plaintiff, the contractor, refuses to go on with the work and abandons the contract, that there had been a breach on the part of the Government of a most essential part of that contract, in that the representations and statements made by the defendants, as to the results of the test borings and the nature of the information on the strength of which they had based the belief which they had expressed, as to the character of the material in the river bottom, were untrue, the contractor was clearly entitled to abandon the work, which abandonment would not be a rescission, such as to disentitle it to recover for its breach against the defendants.

The effect of the warranty had been to cause the plaintiff to undertake a piece of work which it might otherwise never have undertaken at all, and certainly not have undertaken to perform with a plant and equipment not suited for the dredging of such difficult material as "compacted sand and gravel" and other difficult and refractory material such as was actually encountered and might have been *anticipated* as the result of *all* the borings, *had they been disclosed to it at the time of making its bid.*

The breach of this warranty on the part of the defendants rendered the performance of the work extremely difficult and removed the possibility of any profit, and it would seem, therefore, that under these circumstances, upon the authorities already quoted, the plaintiff may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damage which it has sustained by reason of the non-performance which the other has caused.

The Question of Jurisdiction.

The contention is made, or attempted to be made, on the part of the Government in its brief, that this is an action sounding in tort, so that the Court of Claims has no jurisdiction.

It is submitted that there is nothing in this case to justify such a contention. It may be that the claim for damages made by the claimant in its Petition is wider in its scope than can be allowed in an action other than an action for deceit.

But there is no charge of fraud made in the Petition, and there is no finding of the perpetration of any fraud on the part of the Government in the findings of fact. It is true that it is charged in the Petition that the Government made certain misrepresentations; that it stated that it had made borings when, in point of fact, it had only made what ought properly to be called soundings; that it stated it had a belief when, in point of fact, it was making a mere guess, and the Court of Claims finds as a fact that the statement to the effect that the map exhibited to the bidder showed the results of all the borings the Government had made was not true, but there is no allegation and no attempt at proof or any evidence at all that any of these misstatements were made with a fraudulent purpose or for the object of misleading and cheating the contractor.

In order to establish a fraud on the part of the Government in cases of this kind, it would be necessary to allege and prove that Col. Kuhn, who advertised for bids on behalf of the Government, and exhibited the specifications and maps to them, had knowledge of the fact that these maps did not reveal the results of all the borings and did not, therefore, constitute a true record of all the information which the Government had in making the statement to the contractor of its belief in regard to the character of the material to be dredged, whereas there is no such allegation and no such proof or attempt at proof. There is no reason for doubting that the statements made by Col. Kuhn were made in perfect good faith, nor is there any charge or proof or attempt at proof that the failure of the subordinate officials, whoever they were, to transfer the result of the borings first made at Nos. 112 and 113, where they struck impenetrable material, compacted sand and gravel, to the map shown to the bidder was intentionally or fraudulently done, rather than accidentally, owing to, as in the case of *Christie vs. United States, supra*, the supposition that it was not necessary to do so.

The Government's Contention Examined.

It is submitted that the defenses set up in the appellee's brief do not by any means meet the case made by the facts. It may be said to establish the proposition that one of the allegations made in the Petition—that is to say, one of the misrepresentations alleged to have been made—was not found by the Court of Claims to have been proven, viz, the statement that the Government had made no "borings," but only "soundings," in the area to be dredged under the contract.

It is true that the Court of Claims finds that according to the practice prevailing on the Delaware River, at any rate, the probings made by the Government in testing the character of the bottom were properly designated as borings, and

that there are two classes of borings—core borings and wash borings—by both of which methods actual specimens of the material in the various depths of the bottom would have been brought up; but the brief does not meet the vital fact, established by the undisputed evidence and found by the Court of Claims as a fact, that the map to which bidders were referred for information regarding the probable character of the material to be dredged, under the contract, and for an inspection of the borings which the Government had made, was utterly misleading, in that it failed to inform them that two other borings, in addition to the ten appearing on the map, had been made, as a result of which compacted sand and gravel, impenetrable, had been encountered.

Neither does the brief meet the charge made in the Petition, and established by the evidence, that the facts in possession of the Government (although, of course, not all of them were known to the contracting officer who invited the bids and made the contract) did not justify the statement of a belief on the part of the Government that the material to be dredged was "mainly mud or mud with a mixture of fine sand," except in a place not covered by this contract, where it is stated positively to be "firm mud, sand and gravel or cobbles."

Certainly, that statement, taken in connection with the ten borings referred to on the map, undoubtedly meant that *so far as the Government knew*, or had any reason to believe, that the material in the area to be dredged under this contract was either "soft mud," as indicated by six of the borings; "loose gravel," as indicated by two, or "firm, sandy mud," as indicated by the other two borings, and that there was no indication anywhere of the existence of compacted sand and gravel.

And that statement was undoubtedly untrue, unless we assume that the appellant—that is to say, the United States Government—is not to be charged with the knowledge which the men who made these probings at 113 and 114, and entered

the results upon the field notes, as "compacted sand and gravel, impenetrable," had.

Certainly, no one would imagine for a moment, from what the Government stated in its specifications that it had any reason to believe, as the result of any investigation which it had made, that there was any likelihood that the contractor would encounter any such material as compacted sand and gravel in the area to be dredged under this contract.

It is not believed for a moment that the United States Army officer who invited these bids and made those representations would have made them if he had had knowledge of the fact that material had been encountered in the making of the test borings which was not shown on the map.

The misrepresentations, therefore, while vitally material, were entirely innocent and entirely free from any purpose to defraud on the part of the Government, and could not, in any event, be made ground for an action of deceit or tort of any kind.

Conclusion.

In conclusion, it is respectfully submitted that the allowance made by the Court of Claims to the contractor in this case was, to say the least, most conservative, being confined to the amount actually expended by it in money, less the amount received from the Government, and excluding entirely his claims for the use of his plant, "overhead" expenses, etc., during the long period over which the work was done, and that the judgment of the Court of Claims should be affirmed.

W. L. MARBURY,
W. L. RAWLS,
Counsel for Appellee.

Baltimore, March 1st, 1920.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1919.

UNITED STATES *v.* ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued March 16, 1920.—Decided April 26, 1920.

The specifications upon which a dredging contract was based described the materials to be removed as believed by the Government to be mainly mud and fine sand; declined to guarantee the accuracy of the description; required bidders to examine and decide for themselves; referred them to maps exhibiting results of test borings made by the Government, confirming the description; declined to guarantee that such borings actually represented the character of the bottom over the entire vicinity in which they were taken, but expressed the Government's belief that the general information thereby given was trustworthy. The representations were deceptive in that the test borings gave information to the Government not imparted to bidders, of materials more difficult to excavate than those shown by the maps and specifications.

Held: (1) That a contractor which relied upon such representations of the results of the borings and of the Government's belief based thereon, and whose reliance was confirmed by the Government's approval of its plant,—adapted only to the lighter materials and submitted for inspection as to its adequacy pursuant to the specifications—was entitled to stop work after part performance,

and recover the difference between the cost of the excavation done and the amount received under the contract. P. 9.

(2) That this right was not lost by proceeding with the work and entering into a supplementary contract, after the heavier materials were encountered, but before the contractor learned of the results of the test borings and that they were inadequate. P. 11.

(3) That the cause of action was in contract, not in tort. P. 12.

53 Ct. Clms. 490, affirmed.

ACTION in the Court of Claims to recover the sum of $545,121.72 from the United States on account of expenditures and loss caused, it is alleged, in the execution of a contract which claimant was induced to enter into by false and misleading statements of the officers of the United States in charge of excavations in the Delaware River.

In pursuance of advertisement by the United States through Colonel Kuhn, the dredging company entered into a contract to do a certain part of the work for the sum of 12.99 cents per cubic yard, scow measurement.

Sealed proposals were required by the advertisement and it was stated that information could be had on application, and bidders were invited to base their bids upon the specifications which had been prepared, and were submitted, by the Government.

The specifications stated that the depth of the channel to be dredged was thirty-five feet, and under the heading "Quality or Character of the Material," contained the following: "The material to be removed is believed to be mainly mud, or mud with an admixture of fine sand, except from Station 54 to Station 55+144, at the lower end of West Horseshoe Range [the latter is not included in the contract] where the material is firm mud, sand, and gravel or cobbles." It was stated that "bidders are expected to examine the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description."

The further statement was that "a number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy."

To ascertain the character of the material to be dredged the Government officers had subjected the bottom of the river to certain borings, called according to their manner of being made, "test borings and wash borings," and the results thereof were correctly reported and recorded on the log or field notes at the time, that is, that the probe had penetrated or had not penetrated, but there was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made. It was hence shown that the material to be encountered was "mainly mud, or mud with an admixture of sand." In other words, the map did not contain a true description of the character of the material which was to be encountered, and was encountered, by the dredging company in the prosecution of the work. The material dredged, at certain places, differed from that shown on the map exhibited to bidders. The company made no independent examination, though it had time to do so, and in making its proposal it stated that it did so with full knowledge of the character and quality of the work required.

The proposals required the character and capacity of the plant proposed to be employed by the contractor to be stated and that it should be kept in condition for efficient work and be subject to the inspection and approval of the "contracting officer." In compliance with the requirement the plant was submitted to such officer and by him inspected and approved. It was efficient for dredging

the character of material mentioned in the specifications and described on the map to which bidders were referred for information; it was not efficient for dredging the material actually found to exist, and the company secured the services of another concern to do the dredging for it, and that concern did all of the work that was done.

After the company, and the concern it had employed, had been at work for some time, it complained of the character of material which was being encountered, and a supplementary contract was entered into by it and the "contracting officer."

This contract recited that "heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, had been encountered" and provided that such material might be deposited in the Delaware River instead of on shore, as provided in the original contract.

At the time of making the supplemental contract the company was not aware of the manner in which the "test borings" over the area embraced in its contract had been made. Upon learning of this in December, 1915, it discontinued work and declined to do further work. The company then had not been informed of the fact that impenetrable material had been reached by the probe. At the time of the cessation of work there remained approximately 350,000 cubic yards of material to be dredged in the area of the contract. The American Dredging Company completed the dredging at 16.2 cents per cubic yard.

The amount expended by the company was $354,009.19 upon which it had received $142,959.10 making its loss on the contract $211,050.09. For such sum judgment was rendered and the United States prosecuted this appeal.

Mr. Assistant Attorney General Davis for the United States:

There was no misrepresentation in fact or in law by

which claimant was justified in rescinding the contract and suing for damages. *Southern Development Co.* v. *Silva*, 125 U. S. 247, 250. There is no claim that by the action of the Government it was prevented from completing its contract. Claimant's case must rest upon the theory that the Government made a representation which amounted to a warranty or guaranty.

But the Government made no positive statement as to the character of the material; the statements attributed to it are far from being as strong as those held to be mere expressions of opinion in *Southern Development Co.* v. *Silva, supra.* Claimant was shown the facts upon which the opinion was based; though urged to do so, it made its bid without making an independent investigation. It relied on a belief of the Government, knowing that it was only a belief.

Nor was there any concealment of a material fact with reference to the test borings. The specifications stated that test borings had been made, and the results. It is not apparent why, when the specifications showed that test borings had been made and the probe boring method was the one universally used, and no inquiry was made by claimant as to the manner in which they had been made, there was any duty on the part of the Government to state that the probe method had been used. Nor was there any duty to recite that the probe had struck impenetrable material. The specifications purported to show the materials actually encountered, nothing more. There was no recital as to how the test borings were made, but the material encountered was truthfully shown.

In *United States* v. *Stage Co.*, 199 U. S. 414; *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; and *United States* v. *Spearin*, 248 U. S. 132, positive statements were made as to material facts, which caused loss to the contractors which they would not otherwise have incurred.

The case falls in the class illustrated by *Simpson* v. *United States*, 172 U. S. 372, where the court refused to imply a warranty. In the case at bar there is no finding that any representation was made to claimant by any officer of the Government. Even if any such statement had been made, it cannot avail the claimant unless the representation is a part of the written contract. *Simpson* v. *United States, supra.* "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *Spearin* v. *United States*, 248 U. S. 136.

Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped. 2 Pomeroy, Eq. Juris., 4th ed., §§ 916, 917. *Shappirio* v. *Goldberg*, 192 U. S. 232; *Wilson* v. *Cattle-Ranch Co.*, 73 Fed. Rep. 994; *Kingman & Co.* v. *Stoddard*, 85 Fed. Rep. 740; *Richardson* v. *Lowe*, 149 Fed. Rep. 625; *Ripley* v. *Jackson Co.*, 221 Fed. Rep. 209; *Gregg* v. *Megargel*, 254 Fed. Rep. 724; *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. Rep. 573. That there can be no question as to its election and that it is estopped is further shown by the supplemental contract made after the work had been in progress for more than two years. Even if misrepresentation existed in regard to the first contract, claimant could not disregard the second and rely upon some claim with reference to the first to relieve it from the obligation of the second. *International Contracting Co.* v. *Lamont*, 155 U. S. 303, 309.

Claimant's action and the judgment below were both based, not upon contract, but tort. The Court of Claims had no jurisdiction. *Gibbons* v. *United States*, 8 Wall. 269; *Morgan* v. *United States*, 14 Wall. 531; *Schillinger* v. *United States*, 155 U. S. 163; *Juragua Iron Co.* v. *United States*, 212 U. S. 297; *Basso* v. *United States*, 239 U. S. 602; *Ball Engineering Co.* v. *White & Co.*, 250 U. S. 46; *Smith*

v. *Bolles*, 132 U. S. 125. The Court of Claims has failed to distinguish between cases where the damage is the loss occasioned by a wrongful act, and those where a claimant has recovered from the United States either because without any fault of his own he was prevented from completing the contract, or when, as in the *Christie Case, supra*, extra work was required for which the United States was responsible by warranty or otherwise. In these cases the damage is always for the amount necessary to compensate the claimant for the work done and can only be on the theory of *quantum meruit*. See *United States* v. *Behan*, 110 U. S. 338. Here the claimant abandoned the work and rescinded the contract on the theory that a false representation had been made to it and sued for its loss as damages. This it could not do, even if it had been prevented by the United States, without its fault, from proceeding with the contract, because it had rescinded it. *United States* v. *Behan, supra*. It sued for damages on account of the tort, a false representation. On the finding of facts, there could be no judgment in any amount on the ground of *quantum meruit*, for there is no showing as to what the dredging was reasonably worth, and the court was not considering what the work was reasonably worth, but only claimant's loss. This loss is only one of the elements and is not determinative at all.

Mr. W. L. Marbury, with whom *Mr. W. L. Rawls* was on the brief, for appellee:

This is an action for breach of a warranty or condition, consisting of the representations made by defendant in its specifications, with respect to the information which it had received, as shown by the maps, to which bidders were referred, in regard to the probable character of the material to be dredged, and also as to the grounds upon which it based its "belief" that the material would be

found to be "mainly mud, or mud with an admixture of fine sand."

The Court of Claims finds that the maps did not show the results of all the test borings which had been made; that two borings had been made, the results of which did not appear upon the maps, and the results of which would have disclosed the fact that material had been encountered in this area of a far more difficult character than that shown to have been found in the ten borings which had been recorded, and would have disclosed the presence of the kind of material which was actually encountered later, when the work was being done under the contract.

The court below having found as a fact the making of this representation, and the further fact that it was not true, the appellee is entitled to recover, as for a breach of warranty or condition. *United States* v. *Spearin*, 248 U. S. 132; *Anvil Mining Co.* v. *Humble*, 153 U. S. 540; *United States* v. *Stage Co.*, 199 U. S. 414; *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234.

The appellee was justified in refusing to go on with the work when it discovered that the Government had failed to disclose upon the map two borings which had been made by it within that portion of the river covered by the contract in question, when it was definitely and specifically representing that the map showed the result of the borings which had been made by the Government. *United States* v. *Spearin*, 248 U. S. 132. See also cases cited, *supra.*

The *Christie* and *Hollerbach Cases* involved representations as to the character of the work to be done, and clearly establish that such representations are material. The point which those cases did not decide, which is involved here, is what are the rights of the contractor in such a case with respect to stopping work. In both

those cases and in the *Stage Co. Case*, the contractor completed his work under the contract, and claimed an additional amount for damages arising out of the misrepresentations.

The *Spearin Case* makes clear that a breach of warranty or condition, which relates to the character of the work to be done, goes to the root of the contract, and justifies the contractor in stopping work. It further holds that in such an event the contractor does not lose his rights under the contract, but may sue for its breach and recover the amount of his outlay, plus such profit as he would have made had he completed the work.

In *United States* v. *Behan*, 110 U. S. 345, the court says that, "when a party injured by the stoppage of a contract elects to rescind it," his recovery is upon the *quantum meruit*. The authorities are clear that a mere stoppage of the work or an abandonment of a contract, when this is justified by some breach of the contract by the other party, does not work a rescission of the contract in the sense that no right of action can be asserted thereunder by the party who was compelled by the act of the other party to abandon the fulfillment of the contract. To permit this would in effect allow one party by his own wrongdoing at any time to put an end to a contract. See *Anvil Mining Co.* v. *Humble*, 153 U. S. 540.

This is not an action sounding in tort. There is no charge of fraud and no finding of fraud. The petition charges certain misrepresentations, but there is no allegation and no attempt at proof that any of these was made with fraudulent intent.

After stating the case as above, MR. JUSTICE MCKENNA delivered the opinion of the court.

The case turns upon the statement of the Government of its belief of the character of the material to be en-

countered, and, as misrepresentation, the omission from the map exhibited to bidders of the actual borings made and their disclosures.

The Government asserts that there was no misrepresentation, basing the assertion upon the declaration of the specifications that no guarantee was intended and the admonition to bidders that they must decide as to the character of the materials to be dredged, and to "make their bids accordingly."

The assertion puts out of view, we think, other and determining circumstances. There was not only a clear declaration of the belief of the Government that its representation was true, but the foundation of it was asserted to be the test of actual borings, and the reference to maps as evidence of what the borings had disclosed. The finding is that the maps contained a record of twenty-six borings as covering specified sections that were to be dredged, and of these ten were in the section of the river, which by its contract, afterwards made, the plaintiff agreed to dredge.

There was a further assertion of belief, through its "contracting officer," by the approval of the company's plant. As we have seen the Government's care of its interests extended to the inspection of the instrumentalities of the contractor, and required the character and capacity of the plant which was to be used, to be submitted for inspection and approval. In fulfillment of the requirement the company submitted its plant. It was only efficient for dredging material of the character mentioned in the specifications and described on the map, and it was so approved. The significance of the submission and approval are manifest. The character and capacity of the plant conveyed to the officer the fact that the company was accepting as true the representation of the specifications and the map of the materials to be dredged; and reciprocally the approval of the plant by the officer was an

assurance to the company of the truth of the representation and a justification of reliance upon it.

The case is, therefore, within the ruling of *United States* v. *Spearin*, 248 U. S. 132, 136, where it is stated that the direction to contractors to visit the site and inform themselves of the actual conditions of a proposed undertaking, will not relieve from defects in the plans and specifications, citing *Christie* v. *United States*, 237 U. S. 234; *Hollerbach* v. *United States*, 233 U. S. 165, and *United States* v. *Utah, Nevada & California Stage Co.*, 199 U. S. 414. It is held in those cases "that the contractor should be relieved, if he was misled by erroneous statements in the specifications." The present case is certainly within the principle expressed. In the cited cases there was no qualification of the requirement; in this case it was accompanied by the expression of belief, and conduct which was, in effect, a repetition and confirmation of the belief and gave assurance that it had a reliable foundation. The company, therefore, was justified in acting upon it.

The Government, however, contends that, at best, the alternative was presented to the company, when it discovered the character of the materials, to either quit work and sue for damages, or continue the work; and that having elected the latter, it cannot now resort to the other. In fortification of this contention it is said that "even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the materials to be dredged, and claimant knew all there was to know about this from the 'very beginning.'"

This assumption and the extent of it and the conclusion from it, are not justified. It is true the company discovered that the material it encountered was different in character from that represented, but the company did not know of the concealment of the actual test of the borings, and the fact that the company attempted to

struggle on against the difficult conditions with its inefficient plant should not be charged against it. In other words, it should not now be held to have been put to the suggested election. It did not know at that time of the manner in which the "test borings" had been made. Upon learning that they had been made by the probe method, it then elected to go no further with the work, that is, upon discovering that the belief expressed was not justified and was in fact a deception. And it was not the less so because its impulse was not sinister or fraudulent.

The Government makes the point, however, that the implication of the case is that bad methods were used, and insists that the implication makes the action one for a tort, and not tenable against the United States. We cannot assent. There is no intimation of bad faith against the officers of the Government and the Court of Claims regarded the representation of the character of the material as the nature of a warranty; besides, its judgment is in no way punitive. It is simply compensatory of the cost of the work, of which the Government got the benefit.

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE CLARKE dissent.